

104

FEDERALISM

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Federalism, Serial No. 104-19, 104-...

1997
B8
19966

HEARING

BEFORE THE

COMMITTEE ON THE BUDGET HOUSE OF REPRESENTATIVES

ONE HUNDRED FOURTH CONGRESS

SECOND SESSION

HEARING HELD IN WASHINGTON, DC, MARCH 5, 1996

Serial No. 104-19



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CONTENTS

Hearing held in Washington, DC, March 5, 1996	Page 1
Statement of:	
Hon. Becky Norton Dunlop, Secretary of Natural Resources, Commonwealth of Virginia	4
Mr. Nelson Lund, Professor of Law, George Mason University School of Law	32
Mr. Stephen D. Gold, Senior Fellow, the Urban Institute	38
Prepared statements, letters, supplemental materials, et cetera:	
Ms. Dunlop:	
Prepared statement	26
The Williamsburg Resolve	6
Heritage Foundation: State Backgrounder No. 1011/S	13
Written response to question from Representative Orton	59
Written response to question from Representative Roybal-Allard	65
Mr. Lund, prepared statement	35
Mr. Gold:	
Prepared statement	40
Table: Composition of State Spending, 1990 and 1994	45

FEDERALISM

TUESDAY, MARCH 5, 1996

HOUSE OF REPRESENTATIVES,
COMMITTEE ON THE BUDGET,
Washington, DC.

The committee met, pursuant to call, at 10:05 a.m. in room 210, Cannon House Office Building, Hon. John R. Kasich (chairman of the committee) presiding.

Members present: Representatives Kasich, Hobson, Kolbe, Shays, Herger, Allard, Miller, Lazio, Smith of Michigan, Nussle, Shadegg, Sabo, Slaughter, Coyne, Orton, Pomeroy, Woolsey, Roybal-Allard, and Doggett.

Chairman KASICH. Good morning. This morning, as hard as it is to believe, I guess we are heading back into the budget process again; and, to that end, we wanted to have a hearing this morning that talks about—I guess really in some respects, Martin, it almost goes back to the Reagan years when we talked about who best runs government; and you might recall Reagan was way out in terms of sending things back to the States. The fear was that if you send them back, they would not have the money.

I am not particularly interested in sending things back to the States because they save money. I am interested in sending things back to the States because I am hoping that—and believe—that the closer the government is to the people, the better it is.

Frankly, I am not real enamored with sending a whole lot back to the States, because they become bureaucratic pencil-pushers as much as they do in Washington; but I got a sense I can get my—I know where they live. So I have a better chance to affect them. But, frankly, even when you get down to the township level, you even have the same kind of problems with bureaucracy. But my sense is that you have this one-size-fits-all philosophy, which I think it is time to end. Although I think that what we had done for about 40 years made an awful lot of sense.

To that end, we have some witnesses here today. Steve Gold, who is a senior fellow at the Urban Institute; Nelson Lund, professor of law—congenital lawyer—from George Mason University; and we also have with us, to my pleasant surprise, an old friend of mine, Becky Norton Dunlop, who is one who swears off government, sure spends a lot of time in it. She used to work for Ronald Reagan, and she is now a big shot over there with George Allen and is doing a lot of innovative things for the State of Virginia.

Martin and I talked about the schedule, just very briefly. We don't know what the schedule is, because we don't know—just so basically we can get this on the record.

We don't know yet exactly when the CBO is going to send us our new baseline. We are not quite sure what we are doing with the debt ceiling, because I expect over time we will have some more talks with the administration and that will affect what we put in the budget; and I am not sure yet that both the House and the Senate have made any coordinated decision about when we would move a resolution. In addition, we don't have the details of the administration's budget, which we don't expect to get until I think sometime around March 20.

So we will proceed with some hearings, and I would hope to have a little better idea from June O'Neill on the baseline. Obviously, as soon as we know we will let you know, because you will probably want to do some things in coordination with what we are doing. So that is kind of where we are.

I am really delighted to have the witnesses here this morning. I think this is going to be the debate over the period of the next—well, and through the 21st century; and I am anxious to hear the advocates. I am also anxious to hear the concerns of Mr. Gold.

I will—before I recognize you, I do want to tell you one story from the standpoint of the one-size-fits-all philosophy, which is where we have basically been headed, believing that if we design these programs in Washington we will end up with a better result.

I went out to buy a new pair of running shoes the other day, and I went in the store and told the guy I needed a new pair of shoes. He said, great. He said, I will be right back. He came back out with a shoe box; and he said, here are your shoes. I said, well, you didn't ask me for my size. He said, well, we have a one-size-fits-all philosophy in this shoe store. If you are size 10, we cram your foot in. If it is size four, you just wear extra socks. And I said, well, that is not the way I buy my shoes.

I think increasingly we need to move away from government that would function with a one-size-fits-all philosophy and have a little confidence in what the local jurisdictions will do.

Mr. Sabo.

Mr. SABO. I thank the chairman, and I thank you for your comments on schedule, and we will continue to live with the uncertainty.

I also welcome our witnesses for a subject that has intrigued me for years. It might surprise the chairman to know that, early in my years, I did a rating of the Congress on the federalism issue, because I had spent many years in State legislature. We came to one fundamental conclusion and that was, when everything—when all the shoving was over, that the issue of federalism was secondary to other ideologies for everyone, whether it was from the right to the left.

As I recall, I guess because I did the study, I came out with a high mark. But as I recall, the other person who came out with the same grade I did was Barber Conable, who then represented New York. But we looked at issues, you know, like the issue of whether we should tell the States what they can do with their own locally raised funds when it comes to funding abortion, and where one was on that issue governed how one voted on that issue, not one's view of federalism. You could go through a whole series of issues; and,

ultimately, ideology took over any particular philosophy of federalism.

I would suggest that that question of the relationship between the Federal Government and State and local governments and between State government and local government, is always intriguing. I don't think one will ever find the answer in ideology; but it is, rather, a pragmatic issue and a judgment on how things can work.

I would quarrel with the chairman's conclusion that we have a one-size-fits-all system in this country today. The diversity among States is incredible; and how you structure State government and the relationship of State government to local governments is very complex because we have incredible diversity in this country. We also have significant diversity on how we run and administer programs.

But the issue becomes where does Federal responsibility come, where does State responsibility come in a society that is increasingly mobile?

I represent an urban area, an urban area with significant immigration. How our schools do is significantly different between kids who have come up and gone through that school system from beginning to end, in contrast to students who arrive from other States or other regions of the country, for those students the performance is significantly different.

I think the issue of intergovernmental relations also raises a very difficult question of where you raise revenue versus where you place responsibility for delivering services. I have always thought it is easier to raise revenue in a fair fashion in larger units of government, whether it is the Federal Government versus other levels or whether it is a State government State versus local communities in that State; whether at a county level, or in a metropolitan area versus a smaller unit of government. The disparities internally in States are often much greater in raising revenue than even amongst the States.

How you deal with that is always difficult. You also get into the question of changing decisions on how money is spent, apart from where it is raised, which raises a different type of issue. For many years I have been one who thought we should raise revenues at a larger unit of government and delegate certain significant spending decisions to smaller units of government. That gets the funds raised by another tax source to a smaller level simply because the tax system works better over a large unit rather than smaller.

The smaller you get, the more problems there are between taxing units. When you get to a local area, the property tax gets intensive; and the locality that ends up with the bulk of it generally thinks it is because of their great wisdom when, in many cases, in most cases, it is there because of decisions made by others in terms of location of airports and roads today.

So I find it a fascinating subject, one that we always have to work at, but one where I find ideology gives few answers. So I look forward to hearing your comments.

**STATEMENTS OF THE HONORABLE BECKY NORTON DUNLOP,
SECRETARY OF NATURAL RESOURCES, COMMONWEALTH OF
VIRGINIA; NELSON LUND, PROFESSOR OF LAW, GEORGE
MASON UNIVERSITY SCHOOL OF LAW; AND STEPHEN D.
GOLD, SENIOR FELLOW, THE URBAN INSTITUTE**

Chairman KASICH. How do you want to do this? Becky, do you want to go first?

I want to just say that Becky Norton Dunlop has been a very successful woman in government and has had a very major role in the Reagan administration. I am very—I mean, I am particularly happy about that, that we had somebody that got some real authority and some real power and we had a woman who was not discriminated against in that administration and had an opportunity to do some remarkable things, and now she has a big job with George Allen. So I just think it is great for women that Becky has been so successful, and I really look forward to your testimony. Fire away, Becky.

STATEMENT OF THE HONORABLE BECKY NORTON DUNLOP

Ms. DUNLOP. Thank you, Mr. Chairman and Mr. Sabo.

I, first of all, would like to thank you for extending the opportunity for a State official to come and speak to you this morning on this very important issue of federalism, and particularly from the Budget Committee. We are grateful that the Budget Committee is considering federalism.

Mr. Chairman, I would ask, first of all, that my entire statement be entered in the record; and I will try to be brief today, as brief as one can be who is totally committed to this concept of federalism.

It is a pleasure to discuss federalism with you, this indispensable concept by which to a greater or lesser degree Americans have governed themselves for over 200 years. Able scholars have penned many learned treatises on the complexities of federalism; but, at bottom, the term refers simply to a constitutional structure that stipulates how governmental power will be dispersed.

The very essence of federalism consists in reserving a certain degree of sovereignty for each of government's parts. All federations are designed to make impossible the full concentration of jurisdiction and power in the central government. To the degree that power does become concentrated in one or another of government's constituent parts, well, to just that degree our self-determination is undermined and tyranny becomes a greater and greater hypothetical possibility.

Tyranny. The very word makes all Americans—Republicans, Democrats, independents, liberals and conservatives—nauseous. It always has and, Lord willing, it always will. To fend it off, the Founding Fathers of our great country, who had seen quite enough of this word called tyranny, constructed an elaborate system of checks and balances that would impede any portion of government from gaining a monopoly of power, from riding roughshod over the other portions and, by extension, over the people in whose name and by whose authority government exists and acts.

Without going into great detail, I will simply note that the Founding Fathers divided the power of the central, or national,

government into three constituent parts: the executive, the legislative, and the judiciary. Balanced against these three components of the central government they placed the States and, ultimately, the people themselves. Though this relationship is implicit throughout the text of the U.S. Constitution, it finds explicit recognition in the 10th amendment to our Bill of Rights, which states with stark—and one would have thought unmistakable—clarity: “The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.”

Mr. Chairman, it was provisions like this that prompted British Prime Minister William Gladstone to remark that the American Constitution is the most wonderful work ever struck off at a given time by the brain and purpose of man.

As a representative of the great Commonwealth of Virginia, I take special pride in recalling Thomas Jefferson’s boast to an uncomprehending European: “Here, sir, the people govern.”

Suggesting the need to provide for a balanced distribution of power, yet another Virginian, Patrick Henry, urged that something like the 10th amendment be added to the Constitution and explained:

* * * if there be a real check intended to be left on the Congress, it must be left in the State governments * * *
Human nature never will part with power. Look for an example of voluntary relinquishment of power from one end of the globe to another. You will find none.

Unfortunately, the federalism built into the Constitution and spelled out so explicitly by the 10th amendment has been under relentless attack for at least the last 60 years. Americans have grown accustomed to a Big Nanny central government taking the lead, issuing orders, and doling out benefits. Though many Americans are awakening to this constant abuse of power, many more have not; and, incredibly enough, some even view as unpatriotic any efforts to rein in the power of the central government, to set right the tilted balance.

But, in fact, as Jefferson, Henry, and virtually all of the Founders of our great country would agree, it is the heart of patriotism to insist on a central power whose powers are limited, are indeed enumerated. Why? Because to regard the immense expansion of the central government’s power as intrusive is to understate the case.

Today, there is scarcely any human activity—with the possible exception of daydreaming—that the central government does not attempt to manage, to regulate, in a word, to control. Often, this is rationalized as the inevitable product of living in a more complex world than did the Founding Fathers. I myself doubt that the world is really all that much more complex or that the choices faced by our ancestors were really all that much simpler if placed in their proper context. In any case, it certainly would have astounded and horrified the Founding Fathers to see how far we have drifted from the Federal system that they designed and bequeathed to us.

Lest anyone think I am exaggerating, let me, if I can, quote the words of yet another Virginian. You know, once a Virginian starts

quoting Virginians, there is just no stopping the torrent. James Madison wrote in Federalist Letter 45:

The powers delegated by the proposed Constitution to the Federal Government are few and defined. Those which are to remain in the State governments are numerous and indefinite. The former will be exercised principally on external objects, as war, peace, negotiation, and foreign commerce; with which lasts the power of taxation will, for the most part, be connected. The powers reserved to the several States will extend to all the objects which, in the ordinary course of affairs, concern the lives, liberties, and properties of the people, and the internal order, improvement and prosperity of the State.

Does that sound to you like the political order we live under today? Well, it is not entirely accurate to assert that the Founders' vision has been forgotten, but it certainly has been neglected and even spurned.

Thus, Mr. Chairman and members of the committee, I maintain to you that the single greatest reason to reinvigorate our moribund Federal system is that, by doing so, we will be taking a giant step toward reinvigorating the constitutional government that the Framers intended to protect our very freedoms. There are many additional reasons, of course, reasons that I hope we will be able to discuss more fully this morning. But, again, the rescue of constitutional government must be our top priority.

Sadly, one of federalism's greatest advantages, avoiding the danger of government by remote control from afar by out-of-touch officials, bureaucrats, and staffers, has fallen by the wayside. Localities and States have lost much—very much—of the control that federalism guaranteed them; and with that loss has come apathy, cynicism and despair among our citizenry.

No one has done a better job, in my opinion, of summing up the unhappy situation that we find ourselves in today than Virginia's current Governor, George Allen, who must wrestle daily with an unending array of costly Federal regulations, restrictions, and mandates. Governor Allen hosted 30 Republican Governors in Williamsburg just after the historic 1994 elections and led the way in working with them to construct the Williamsburg Resolve—the text of which I would like to insert in the record today—which forcefully argued that we must restore our largely vanished Federal system.

[The information referred to follows:]

THE WILLIAMSBURG RESOLVE

We gather at an historic moment at an historic place.

Here and in other colonial capitals, the Nation's Founders first debated the idea of independence and the fundamental principles of freedom. Then, the challenge to the liberties of the people came from an arrogant, overbearing monarchy across the sea.

Today, that challenge comes from our own Federal Government—a government that has defied, and that now ignores, virtually every constitutional limit fashioned by the Framers to confine its reach and thus to guard the freedoms of the people.

In our day, the threat to self-determination posed by the centralization of power in the Nation's Capital has been dramatically demonstrated. The effects of intrusive Federal Government authority have been felt so widely and so profoundly that a united chorus of opposition has risen from town halls and State capitols, from com-

munity organizations and private associations, from enterprises and individuals, across America.

The founders of our Republic and the Framers of our Constitution well understood the ultimate incompatibility of centralized power and republican ideals. They did not pledge their lives, fortune, and sacred honor to achieve independence from an oppressive monarchy in England only to surrender their liberties to an all-powerful central government on these shores. Rather, they devoted their considerable energies and insights to erecting an array of checks and balances that promised to prevent the emergence of an unresponsive and unaccountable national government.

Chief among these checks were to be the State governments, whose sovereignty was expressly acknowledged in the 10th amendment to the Constitution, and whose sweeping jurisdiction and popular support were presumed sufficient to resist Federal encroachment. The Federal Government, by contrast, was given certain expressly enumerated powers and denied all others. From this balanced Federal-State relationship, predicated on dual sovereignty, there was to come a healthy tension that would serve as a bulwark against any concentration of power that threatened the freedoms of the people.

Two centuries later, it is clear that these checks and balances have been dangerously undermined. The States have witnessed the steady erosion—sometimes gradual, sometimes accelerated—of their sphere of responsibility. Today, there is virtually no area of public responsibility or private activity in which Federal authorities do not assert the power to override the will of the people in the States through Federal rules, rulings, and enactments.

Our freedoms are no longer safe when they exist only at the sufferance of Federal legislators, Federal courts, and Federal bureaucrats.

The people of the States seek to regain control of their own destiny, and they have entrusted State leaders with the responsibility for achieving this fundamental reform in our governmental system. We are pledged to fulfill this promise by restoring to the States and the people the prerogatives and freedoms guaranteed to them under the Constitution.

EXCESSES AND ABUSES BY THE FEDERAL GOVERNMENT

We begin by candidly enumerating, as did our forebearers, the grievances of the people who have turned to us for leadership:

- The Congress and executive branch, regardless of the party in control, have imposed ever-growing numbers of mandates, regulations, and restrictions upon States and local governments, removing power and flexibility from the units of government closest to the people and increasing central control in Washington.
- Federal action has exceeded the clear bounds of its jurisdiction under the Constitution, and thus violated rights guaranteed to the people. The government of "limited, delegated powers" envisioned by the Framers has become a government of virtually unlimited power.
- Federal courts have largely refused to enforce the guarantees of the 10th amendment, which reserves to the States and the people powers not expressly delegated to Congress. Most Federal court decisions have refused to recognize any meaningful constitutional limit to congressional power.
- In holding that the States must rely on political processes in Washington for their protection, the Federal courts have permitted Congress and Federal agencies to treat the States as though they are merely part of the regulated community, rather than as sovereign partners in a Federal system of shared powers.
- Federal mandates have imposed enormous costs on States and localities, draining away resources and preventing State governments from addressing pressing local needs such as education, law enforcement, and transportation.¹
- With a persistent budget deficit, the Federal Government has forced the burden of funding Federal programs onto State and local governments, resulting in increased taxes at the State and local level that citizens do not want.
- Federal mandates and preemptive measures deprive State and local governments of the ability to set priorities, thereby diminishing their ability to allocate resources and tailor programs in the way best suited to meet local needs.
- Federal laws impose "one-size-fits-all" requirements that often make no sense in light of local conditions and force States and localities to waste limited resources.
- The Federal Government's failure to meet its own responsibilities has forced States to incur billions of dollars in excess costs.

¹ The U.S. Conference of Mayors has estimated that unfunded Federal mandates consume almost 12 percent of locally raised revenues.

- In addition to laws passed by Congress, States and localities are burdened by mushrooming numbers of complex, lengthy, and incomprehensible regulations, imposing enormous costs of compliance. These regulations are drafted by unelected bureaucrats who are not accountable to the people.²

- Congress has not only assumed ever-growing power for itself; it has thwarted many State initiatives to deal with local problems. Federal preemption of State and local laws has reached unprecedented proportions.³

- Congress has refused to make itself subject to the same laws that it has imposed on States, localities, and citizens, granting itself exemptions from labor, civil rights, and other laws that States, localities, and citizens must obey.

- Congress has failed to show a capacity for self-regulation in its relations with the States, failing thus far even to pass reform measures to restrain the growth of unfunded mandates.

THE EFFECTS OF CENTRALIZED POWER IN WASHINGTON

The effects of the centralization of power in Washington are evident in the acute frustration and feeling of powerlessness among the voters, which was manifest in the recent congressional elections.

I. Decisions affecting the lives of citizens have been placed beyond their reach.

As Federal institutions—Congress, the Federal courts, and the Federal bureaucracy—have seized ever-greater responsibility for determining policy on issues of importance, the ability of citizens to influence the course of government has been diminished. Decisions made through government processes at the State and local levels are far more accessible to citizens than decisions made in Washington. Citizens increasingly feel powerless to shape their future because fewer policy choices are made at levels of government within their grasp.

II. Centralized power in Washington is denying to the people the responsiveness and accountability that are essential for republican self-government.

The hallmark of self-determination is government that is responsive and accountable to the people. The appetite for power on the part of Federal institutions has allowed a centralized government to operate often without the support of the people and in disregard of their will. This has undermined the very premise of representative democracy.

Citizens possess little or no control over the actions of Federal courts and the Federal bureaucracy, both of which have assumed dramatically broadened policymaking roles in recent decades. In the recent elections, Americans signaled their determination to reassert control over the Congress, which has long been largely insulated from accountability to the voters by reason of procedure, perquisite, and distance.

The problem is not that the Federal Government invariably pursues the wrong aims or invariably fails to attain those aims which it pursues. Examples abound in our history where the exercise of Federal power has been wise and unwise, effective and ineffective, constructive and destructive.

The problem, fundamentally, in a country of this size and diversity, is the inherent unaccountability of a national legislature and bureaucracy. Governments at all levels can and do make mistakes that call for correction. Such corrections, however, are more easily accomplished at the State and local levels, where voters can more easily hold the responsible decisionmakers accountable. When decisions are made at the Federal level, the actions that aggrieve people in one State typically are made by officials elected from other States, or by officers who are not elected at all, and over which the affected citizens thus have no real political influence.

III. The people's acute frustration and anger today are directly attributable to the growth of Federal power at the expense of State and local governments.

There has been much commentary about the current popular mood of profound discontent and cynicism. Some apologists for the status quo have sought to blame the people for having unreasonable expectations. This is the ultimate insult to an electorate that has seen the value of its franchise systematically diminished by the transfer of policymaking powers away from accountable State and local officers to the aloof power structure in Washington.

The current, cresting feeling of frustration and futility among voters is not an inexplicable phenomenon. To the contrary, it is a direct and wholly predictable con-

²The Congressional Budget Office estimates that regulations imposed on local governments during 1983–1990 cost up to \$12.7 billion.

³Of 439 explicit preemptions of State and local laws enacted by Congress in the 202 years from 1789 to 1991, 233 (53 percent) were enacted in the 21 years between 1970 and 1991.

sequence of the shift of government power to institutions beyond the grasp of the people.

The problem is not only that decisionmakers in our Nation's Capital are remote and unaccountable. It is that their actions in many cases have rendered State and local officials unresponsive as well. Officials at the State and local levels often cannot meet the expectations of the people who elected them because of an inhibiting web of Federal laws, regulations, court orders, administrative interpretations, and edicts. Thus, there is a widening gulf between the voters' demands for change and the ability of State and local leaders to surmount Federal obstacles and effect that change.

THE MEANS OF CORRECTION

Recognizing the imperative of reform to restore balance in Federal-State relations and empower citizens, we turn our attention to the question of remedy.

In the Federalist No. 46, James Madison commented on the primary means by which the States would correct any intrusion of Federal power upon their prerogatives. He wrote:

"[A]mbitious encroachments of the Federal Government on the authority of the State governments would not excite the opposition of a single State, or a few States only. They would be signals of general alarm. Every government would espouse the common cause. A correspondence would be opened. Plans of resistance would be concerted. One spirit would animate and conduct the whole. The same combinations, in short, would result from an apprehension of the Federal, as was produced by the dread of a foreign, yoke. * * *

The concerted action by the States envisioned by the Father of our Constitution is now required.

Concerns about the condition of Federal-State relations have been voiced throughout our Nation's history. But, today, there is a unique need—and a unique opportunity—for reform:

- Never has there been a broader consensus among the States—and among the elected officials and voters in the States, regardless of party—that the Federal Government has pervasively exceeded its constitutional bounds and must be restrained.
- Never has there been a national debate over Federal-State relations directed exclusively to the merits of the question, and neither obscured nor diverted by divisive policy disputes that pit region against region or State against State.
- Never have those wielding Federal power from Washington until the recent election been so imperious in their assertion of Federal supremacy and so out of step with the majority philosophy and views of the American people.
- And never has there been such a profound change in national leadership, bringing into Federal office persons disposed to support bold reform to restore the States and the people to their rightful place in our constitutional system.

In short, this is an historic moment of opportunity—an occasion when the political climate makes possible fundamental change in the Federal-State relationship.

While congressional cooperation is essential in order to achieve this structural change, the leadership for lasting reform must come from the States.

A COMMON AGENDA OF REFORM

Recognizing the urgency of the need and the uniqueness of the opportunity for reform, we declare our common resolve to restore balance to the Federal-State relationship and renew the Framers' vision. An agreed agenda for concerted action to achieve this objective is essential. Among the principal elements of this common agenda of reform are these:

I. Mobilizing the People to Reclaim Their Freedom

The people of the United States, and of the several States, are frustrated and disillusioned by the decline of responsiveness and accountability in our political processes. This feeling of powerlessness has been manifested in calls for a host of political reforms, including greater direct democracy, term limitations, and various campaign reform proposals. Yet, too few of our citizens appreciate the central role that the erosion of State and local prerogatives, and the emergence of the Federal bureaucratic, judicial, and legislative leviathan, have played in their loss of political liberty.

We are resolved to bring these developments and consequences urgently to the attention of the people of our States, and all Americans. Only when our citizens fully appreciate the practical and pervasive impact on their daily lives of federalism's decline will they demand change.

II. Litigation to Enforce the 10th Amendment

The central purpose of the United States Constitution was to establish a Federal Government of expressly delegated and therefore limited powers. The powers reserved by the States were, in Madison's words, "numerous and indefinite," extending "to all objects which, in the ordinary course of affairs, concern the lives, liberties, and properties of the people, and the internal order, improvement, and prosperity of the States."⁴ The Framers of the Bill of Rights specifically designed the 10th amendment to protect the States from encroachments by the Federal Government on their reserved powers.

In the *Federalist*, No. 39, Madison recognized that the Constitution entrusts to the Supreme Court alone the responsibility to police and to nullify Federal encroachments on the reserved powers of the States and that the Court's faithful exercise of that responsibility would be "essential to prevent an appeal to the sword and a dissolution" of the Constitution itself. The Supreme Court, however, has failed to enforce the constitutional boundary between the respective powers of the Federal and State governments. For over half a century, the Federal Government has steadily extended its rules and regulations into virtually every area of public and private life, and the Supreme Court has acceded to each succeeding usurpation.

In recent years, the Supreme Court has broadly abandoned its constitutional role, ceding to Congress itself the responsibility to determine the extent of Congress' own legislative power. The decision of the Supreme Court in *New York v. United States*, 112 S.Ct. 2408 (1992), while encouraging in its indication that there is some remaining vitality to the 10th amendment, nevertheless demonstrates the exceedingly modest nature of the limitations on Federal action that the Supreme Court is currently willing to enforce.

Still, because nothing less than the constitutionally guaranteed freedom of Americans to govern themselves is at stake, usurpations by Federal legislators and bureaucrats of powers not delegated to them under the Constitution must be resisted with whatever tools are at hand and in whatever forums are available. Until the Constitution is amended to give the States additional powers to protect against Federal encroachment, recourse to the courts is the only available means of relief.

We are therefore resolved to pursue energetically in the Federal courts 10th amendment challenges to Federal encroachments into the constitutional domain of the States.

III. Restrictions on Federal Mandates and Other Federal Initiatives

Across the country, Governors, mayors, county officials, and State legislators of both parties are working together to obtain relief from burdensome Federal mandates. This bipartisan State-local partnership has created a potent force for change, and offers hope for resolving a broad array of problems arising from Federal encroachment upon State and local responsibilities.

Foremost among these problems is the displacement of State and local priority setting and the imposition of trickle-down tax increase pressure as a result of unfunded Federal mandates. While unfunded obligations are most objectionable, other Federal mandates also impose unacceptable burdens by treading upon areas of traditional State and local responsibility, by imposing onerous conditions on Federal grants unrelated to the purpose of the Federal funding, and by commandeering the States and local governments for the administration of Federal programs and policies.

A majority of the U.S. House of Representatives and U.S. Senate cosponsored mandate relief bills during the 103d Congress. President Clinton, himself a former Governor, has repeated his intention to work with Governors and other State and local officials to end the proliferation of new mandates. Nevertheless, Congress has continued to pass, and the President has continued to sign, legislation that imposes unfunded mandates on the States and on local governments.

Although slightly different forms of the Federal Mandate Accountability and Reform Act of 1994 were passed by overwhelming bipartisan majorities of the Senate Governmental Affairs Committee and the House Government Operations Committee earlier this year, this legislation was denied consideration on the House and Senate floors. The recent congressional election results are cause for optimism that mandate relief legislation will soon be enacted.

The legislation offered earlier this year requires the Congressional Budget Office to prepare an estimate of the costs of new mandates to States and local governments if the total cost exceeds \$50 million a year. It also erects a series of impediments to new mandates, and makes Congress more accountable for those that are

⁴ *The Federalist*, No. 45.

imposed. Through these mechanisms, State and local officials would enhance their political and procedural leverage to defeat unwanted, and especially unfunded, mandate proposals.

While this year's proposed legislation is the most stringent and effective mandate relief bill ever considered by Congress, it is clear that States and local governments want even more far-reaching change. Restoring balance in State-Federal relations is perhaps the most important national reform that could be undertaken by the 104th Congress. From health care to welfare reform to the environment, Congress should work in partnership with the States to attain our mutual goals of empowering State and local governments and achieving the efficient, orderly reduction of the Federal Government.

In cooperation with our respective State congressional delegations, we are resolved to promote prompt and dramatic mandate relief during the next Congress.

IV. A Conference of the States to Forge Consensus on Structural Reforms

While the recent changes in Washington have raised hopes for prompt action to restore balance to the Federal-State relationship, the need for an agreed agenda and concerted action by the States is clear.

A Conference of the States would enable State representatives to consider, refine, and adopt proposals for structural change in our Federal system. The proposals so adopted would comprise the States' Petition, which would be a powerful instrument for arousing popular support and promoting change in Congress and State legislatures.

Throughout our history, the States have faced this dilemma in resisting the growth of Federal power: On the one hand, questions regarding the scope of Federal Government jurisdiction are resolved by Federal courts, which generally have favored more expansive interpretations of Federal power. On the other hand, the States' recourse to the constitutional amendment process has been impeded by Congress' control over the initiation of constitutional amendments. Use of the "convention" method of amendment that is available through direct State action has never been used due to fears that a constitutional convention called by the States would become a "runaway" assemblage that would seek to rewrite our entire national charter.

At the Conference of the States, a variety of proposed constitutional changes could be put forward that would enable the States to become full partners again a dynamic Federal system premised on dual sovereignty.

One possible amendment would provide constitutional protection against unfunded mandates by barring enforcement of Federal legislation that imposes obligations on the States without funding and legislation that imposes conditions on Federal assistance not directly and substantially related to the subject matter of the assistance.

Another proposed structural reform would allow three-fourths of the States to initiate constitutional amendments, and to repeal Federal legislation or regulations that burden State or local governments, subject to congressional authority to override the State-sponsored measures by a two-thirds vote of both houses.

The Conference of the States could also adopt an amendment that would make clear the Supreme Court's duty to entertain and resolve controversies between the States and the Federal Government arising under the 10th amendment.

To be effective, the Conference of the States must focus on fundamental, structural reforms, such as those described above, rather than transitory policy issues or special-interest concerns. It must be scrupulously bipartisan. And it must be proactive, concentrating the influence of the States and focusing public attention nationally on the relevance and importance of federalism.

We are therefore resolved to promote in our respective States and nationally the convening of the Conference of the States, and to urge passage of Resolutions of Participation in our respective State legislatures during the 1995 legislative session.

CONCLUSION

As future chapters are written in the history of this great American experiment in enlightened self-rule, no single contribution can be more important than to preserve the vital checks and balances that prevent the centralization of governmental power and thus stand guard in defense of our liberties. To achieve this essential goal, the leadership must come from the States and the people in the States.

Ms. DUNLOP. "Two centuries ago," Governor Allen said, "the challenge to the liberties of Virginians came from an arrogant, overbearing monarchy from across the sea. Today that challenge comes

all too often from our Federal Government that has defied, and now ignores, virtually every constitutional limit fashioned by the Framers to confine its reach and thus to guard the freedoms of our people."

For over 60 years, we have witnessed a one-size-fits-all approach to countless regulations promulgated by unelected, virtually unaccountable central government bureaucrats—not to mention the Federal judiciary. It is indeed ironic that just before this wholesale assault on federalism began, a Supreme Court Justice, Louis Brandeis, praised the States as laboratories of democracy. How so? Because for most of our history they and the localities have not been fettered by interference from the central government. Instead, they have been able to try all sorts of experiments in accordance with the wishes of the local constituencies, without forcing anything on other States, regions or localities who may have ideas of their own.

Mr. Chairman, from sea to shining sea, fed up Governors, mayors, county officials, State legislators from all parties and all persuasions, and concerned private citizens have begun working together to resist the dreaded unfunded Federal mandate. You know how that constitutionally questionable beast wreaks havoc. States and localities are, in effect, blocked from setting their own priorities and from taking care of their needs as they see them and instead are compelled to pay for costly programs emanating from Washington, DC, more often than not at the behest of some special interest constituency that has little or nothing to do with the State or locality in question.

Still worse, many local governments are forced to raise taxes to pay for what the central government desires and mandates but is unwilling to take Federal responsibility for. States and localities are thereby reduced, in effect, to administrative units of the central government. I can tell you that where the environment and natural resources are concerned this is a major problem, but it doesn't stop there. Unfunded Federal mandates are crippling States where health care is concerned, where welfare is concerned, where education is concerned and where, of course, environmental protection is concerned. The list goes on and on.

Indeed, the U.S. Conference of Mayors has estimated that unfunded Federal mandates consume almost 12 percent of locally raised revenues. Similarly, the Congressional Budget Office estimates that regulations imposed on local governments during the 1983 to 1995 period cost about \$12.7 billion.

In 1993, your State of Ohio, Mr. Chairman, released a comprehensive study identifying the burdens placed on the Buckeye State imposed by unfunded mandates. I have detailed in my written statement this study. The point that they make, though, in the study is that \$856 per year for every household in Columbus, OH, for the next 10 years will be required to pay for just some of the unfunded mandates forced on Columbus from the Federal Government.

Similarly, Aurora, CO, estimates that it will have to repair 28,000 curbs in order to comply with the Americans With Disabilities Act, at an average cost of \$1,500 per curb.

Simply stated, our States and localities can't endure these whopping indirect taxes. Our fiscal backs are being broken, and we find

ourselves struggling to meet the legitimate obligations to fund such needs as law enforcement and transportation.

I know that Congress took some limited action to provide relief against future unfunded mandates. We thank you for that, and we hope that our allies in Congress will apply the act rigorously when foes of federalism propose new mandates. But I would urge you to take a good look, a hard look, at the mandates that are already on the books. These are in dire need of reform, overhaul or perhaps even repeal.

There are countless hours and countless dollars spent by the Federal Government, the central government, micromanaging our compliance with these mandates. Virginia is faced with mandates in a number of areas, and I have been actively involved in some of those mandates from the Environmental Protection Agency. I would certainly be willing to respond to any questions you have on our dealings with the Environmental Protection Agency, but Virginia has stood up and said that some of their mandates are wrongheaded, not good for the citizens and, indeed, not good for the environment. They have not included risk assessment nor benefit/cost analysis; and, not surprisingly, the cost of these mandates has driven up costs for localities enormously and not benefited our environment.

One of the other horror stories that is often told in sessions like this is one from Alaska. The city of Anchorage, Alaska's, sewage inflow was so clean that the municipality could not meet, could not meet, the Federal requirement that all sewage treatment facilities reduce incoming organic waste by at least 30 percent. Nevertheless, the Environmental Protection Agency insisted, with all the force of law behind it, that Anchorage meet this arbitrary standard dreamed up in Washington, DC. So what did Anchorage do? Well, it arranged for two local fisheries to dump fish viscera into the river so the city could remove them.

Now, this is one of the examples documented in a Heritage Foundation "Backgrounder" which I would also like to insert for the record, Mr. Chairman, so that your members could read some of these other atrocities that are told out in the States.

[The information referred to follows:]

HERITAGE FOUNDATION: STATE BACKGROUNDER NO. 1011/S

December 28, 1994

HOME RULE: HOW STATES ARE FIGHTING UNFUNDED FEDERAL MANDATES

[By Thomas Atwood, Director, Coalition Relations, and Chris West, Project Coordinator, Resource Bank]

INTRODUCTION

"When all government, domestic and foreign, in little as in great things, shall be drawn to Washington as the center of all power, it will render powerless the checks provided of one government on another, and will become as venal and oppressive as the government from which we separated."—Thomas Jefferson¹

Throughout much of American history, especially since the New Deal, the Federal Government increasingly has encroached upon the fiscal and constitutional prerogatives of State and local governments. Today, this imbalance has reached a crisis point, and the States are fighting back. Through a variety of initiatives, they are demanding that Federal mandates be funded and, in many cases, even are challenging the authority of the Federal Government to impose these mandates, whether

¹ Letter to Charles Hammond, August 18, 1821.

funded or not. With the new, more State-friendly Congress, States and localities have an historic opportunity not only to effect mandate relief, but also to restore balance in State-Federal relations.

At one time States and localities saw compliance with Washington's conditions as a small price to pay for Federal funding of popular State-implemented programs. But now the Federal share of that funding is decreasing while the mandates are becoming more numerous, complex, and expensive. Unfunded Federal mandates and highly prescriptive Federal programs have backed many States and localities into a fiscal corner, forcing them to sacrifice their own programs and priorities in order to comply with standards set by a distant Federal Government. Aurora, CO, for example, calculates that it will have to repair some 28,000 curbs in order to comply with the 1990 Americans With Disabilities Act [ADA] at an average cost of \$1,500 per curb.² Like many municipalities, Aurora simply cannot afford the Federal mandate, and the January 1995 deadline for compliance with ADA is looming. Columbus, Ohio's, famous 1991 study found that unfunded Federal environmental mandates alone will cost their city \$856 per household per year by the year 2000.³ The National Association of State Budget Officers reports that Medicaid's share of State spending will grow from just over 10 percent in 1987 to 20 percent in 1995.⁴ Federal Funds Information for States projects State Medicaid spending of \$77 billion in 1995.⁵ Ohio Governor George Voinovich complained recently of a "forced tradeoff between Medicaid and education funding. In the past 5 years, education declined as a share of State spending * * * because new Medicaid mandates consume more and more State resources."⁶

Micromanagement by Federal agencies imposes costs and one-size-fits-all standards that treat Lubbock like Detroit and Wyoming like New York. For instance, Anchorage, Alaska's, sewage inflow was so clean that the municipality could not meet Congress' requirement that all sewage treatment facilities reduce incoming organic waste by at least 30 percent. Still, the Federal Environmental Protection Agency insisted that the city meet the arbitrary standard. Anchorage's response was to arrange for two local fisheries to dump fish viscera into the river so the city could remove them.⁷ Arizona legislators have complained that the Clean Air Act is too strict even for the naturally occurring dust from Arizona's deserts, let alone automobile emissions. House Majority Leader Brenda Burns commented: "The Clean Air Act's one-size-fits-all standard cannot work in Arizona. We could take every car off the road and still not be in compliance. I suppose we could pave the desert, but I don't think that would be realistic." Federal courts also micromanage the States by mandating State policies ranging from prison library collections to local tax rates to the education of illegal immigrants. Time and again, Supreme Court decisions have allowed relentless expansion of Congress' enumerated powers.

But States and localities seem to have reached their limit and are fighting back in a number of ways:

- They are publicizing the costs of unfunded Federal mandates and holding their Congressmen publicly accountable for mandate votes.
- They are challenging Congress' authority to impose mandates, resisting micromanagement by the Federal bureaucracy, and in some instances simply refusing to comply.
- They are suing the Federal Government for violation of the 10th amendment⁸ and arguing to constrict the expansive interpretation of the commerce clause.⁹
- They are lobbying Congress to pass mandate-relief legislation and to submit for ratification by the States a "no money, no mandate" constitutional amendment.

² Andre Henderson, "The Looming Disabilities Deadline," *Governing*, December 1994, p. 22.

³ *Environmental Legislation: The Increasing Costs of Regulatory Compliance to the City of Columbus*, Report of the Environmental Law Review Committee to the Mayor and City Council of the City of Columbus, OH, May 1991.

⁴ 1993 *State Expenditure Report*, National Association of State Budget Officers, March 1994, p. 3.

⁵ 1995 *Appropriations Summary—Conference Action Grants-in-Aid: Major Discretionary and Mandatory Programs*, Federal Funds Information for States, September 30, 1994.

⁶ George V. Voinovich, "The Need for a New Federalism: A State-Federal Legislative Agenda for the 104th Congress," memorandum, November 1994, p. 3.

⁷ Thomas J. DiLorenzo, "Unfunded Federal Mandates: Environmentalism's Achilles Heel?" *Contemporary Issues Series*, No. 62, Center for the Study of American Business, December 1993, p. 2.

⁸ The 10th amendment reads: "The powers not delegated to the United States by the Constitution, nor prohibited to it by the States, are reserved to the States respectively, or to the people."

⁹ With increasing boldness and frequency throughout most of America's history, Congress has exploited expansive interpretations of the commerce clause to justify its intrusion into almost any area of American life, so long as some connection (often a distant one) can be made to interstate commerce.

• They are considering collective action to challenge the Federal Government's most grievous intrusions on States' autonomy and to amend the Constitution to reaffirm the principles of federalism.

With increasing frequency, these State actions are carried out alongside the efforts of a growing grassroots movement dedicated to reestablishing the constitutional limitations on the Federal Government. The National 10th Amendment Committee in Colorado, for example, is working with legislators, activists, and groups in over 40 States to pass resolutions asserting State sovereignty under the 10th amendment.¹⁰

Opposing unfunded Federal mandates is a nonpartisan "good government" issue. Whether Republican, independent, or Democrat, liberal, moderate, or conservative, State and local government officials tend to agree: Washington politicians should not be allowed to take credit for promoting popular causes while States foot the bill. Local officials are quick to add that the same is true of unfunded State mandates. As Newark Mayor Sharpe James states, "If something is important enough to require a State or Federal mandate, we should have a voice in deciding how to do it. And if it's important enough to require a mandate, it should be important enough to have State or Federal funding to help carry out the mandate."¹¹

Prohibiting unfunded Federal mandates will restrain overall government spending and regulation and will virtually require Congress to set priorities among programs. It will allow States and localities greater flexibility to devise responses suited to their own particular circumstances, enabling them once again to become "laboratories of democracy." Most important, it will make government more accountable by bringing it closer to the people. Controlling their State legislatures and town councils is far easier than controlling the immense Federal bureaucracy.

COUNTING THE COST

One of the most difficult challenges for States in fighting unfunded Federal mandates has been the complexity involved in calculating the costs. The very definition of an "unfunded mandate" is ambiguous. Technically speaking, strings-attached programs, or grants-in-aid, such as Medicaid are not mandates. Theoretically, the State can refuse Federal funding and decline to participate in the program. In reality, grants-in-aid are offers the States find it difficult to refuse. To deal with this problem of definition, the Advisory Commission on Intergovernmental Relations [ACIR] has coined the phrase "federally induced costs," a useful umbrella that encompasses all unfunded costs the Federal Government imposes on States and localities.¹² Generally, when State and local officials complain about unfunded Federal mandates, they are thinking of this broader concept.

Even with the problem of definition clarified, the task of calculating the costs of Federal mandates is daunting. Hundreds of jurisdictions and agencies can be affected by a single mandate. These entities usually do not have the capacity to monitor the costs. And even if they did, another office would have to assemble the data from all the agencies involved in order to calculate the total. Still, these costs need to be counted, and State and local governments have an interest in making that happen.

Cost Studies

Fortunately, some jurisdictions and research organizations have begun to calculate and publicize the costs of mandates. Among Washington-based State and local government associations, for example, the U.S. Conference of Mayors recently reported that the Clean Water Act alone cost cities with populations greater than 30,000 more than \$3.6 billion in 1993. From 1994 through 1998, the 10 studied mandates will cost cities \$54 billion: the Clean Water Act alone will cost \$29.3 billion; the Safe Drinking Water Act, \$8.6 billion; and the Resource Conservation and

¹⁰ The Committee of 50 States also reports having 28 State coordinators in place to promote its sweeping "Ultimatum Resolution." Describing the States as the "principals" who created the U.S. Government to "act as their agent," its resolution calls for States to dissolve the U.S. government if the national debt reaches \$6 trillion or if either Congress or the President attempts to abolish the Constitution or render it "ineffective, or null or void."

¹¹ "Mandate Malarkey," the *Wall Street Journal*, July 14, 1994, p. A-10. Unfunded State mandates are a common problem in the State-local relationship as well, but some States actually have imposed on themselves the "no money, no mandate" requirement they are demanding from the Federal Government. Twenty-five have statutory and/or constitutional limitations on their ability to impose mandates on local governments. See Joseph F. Zimmerman, "State Mandate Relief: A Quick Look," *Intergovernmental Perspective*, Vol. 20, No. 2 (Spring 1994), p. 28.

¹² *Federally Induced Costs Affecting State and Local Governments*, U.S. Advisory Commission on Intergovernmental Relations, June 1994.

Recovery Act, \$5.5 billion.¹³ The 1993 survey performed by Price Waterhouse for the National Association of Counties estimated that "counties are spending \$4.8 billion annually to comply with just 12 of the many unfunded mandates in Federal programs" and that they will spend close to \$33.7 billion over the next 5 years.¹⁴ The National Conference of State Legislatures' regularly updated Hall of States Mandate Monitor tracks Congress' unfunded mandates and mandate-relief legislation.

In 1993, the governments of Tennessee and Ohio issued Federal mandate cost studies—the first such studies to be focused on individual States. The Ohio report found that unfunded mandates would cost the State \$356 million in 1994 and over \$1.74 billion from 1992–1995.¹⁵ Tennessee found that the annual costs of Federal mandates imposed between fiscal years 1986–1987 and the end of 1992 would grow from \$12 million the first year to \$195 million in 1994–1995 and \$242 million in 2001–2002.¹⁶ In 1994, Texas reported that its federally induced costs rose from \$6.5 billion in the 1990–1991 biennium to \$8.9 billion in the 1992–1993 biennium, and \$11.4 billion in the 1994–1995 biennium.¹⁷ Among State-based research institutes studying mandate costs are the Wisconsin Policy Research Institute and the Barry Goldwater Institute¹⁸ for Public Policy Research in Arizona.

Cost figures such as these demonstrate the major impact unfunded Federal mandates have on State and local budgets. Union County, NC, cleverly shows the effects of mandates on its budget by itemizing the costs of unfunded State and Federal mandates in its tax bills. Moreover, by providing reliable mandate cost figures to the Congressional Budget Office and the Office of Management and Budget, States can help improve the accuracy of these offices' calculations. If States and localities do not develop their own hard numbers, they have less standing to challenge CBO and OMB estimates.

Mandates Auditor Acts

Another way States and localities have begun to address the problem of producing cost figures is by creating mandates auditor offices. In May 1994, Missouri became the first State to establish an office for the sole purpose of tracking federally induced costs. The Missouri legislation charged the "Federal Mandate Auditor" with creating an "inventory of all unfunded Federal mandates on all levels of government in the State, calculating by program and agency the cost of such mandates, and performing an historical analysis of year-to-year trends in unfunded Federal mandates."¹⁹

Michigan State Representative Michael Nye plans to introduce a similar bill in 1995 proposing a State "Mandate Ombudsman" and a mandate database. Modeled after a 1993 Mackinac Center for Public Policy proposal,²⁰ the ombudsman would "track, forecast, disseminate, and distribute information regarding mandated legislation." This new office will coordinate a systematic effort across all agencies of State government to monitor and report on Michigan's federally induced costs.

PUBLICIZING THE PROBLEM

State and local officials have developed several creative ways to publicize the problem and hold Federal lawmakers accountable to their constituents. Among them:

(1) Mandate-Relief and 10th Amendment Resolutions

In the past year at least 12 States passed resolutions calling on Congress to pass specific mandate-relief legislation, to fully fund mandates, to stop imposing mandates, and/or to provide cost estimates for any bills that would impose new man-

¹³ *Impact of Unfunded Federal Mandates on U.S. Cities*, U.S. Conference of Mayors, October 26, 1993.

¹⁴ Price Waterhouse, *The Burden of Unfunded Federal Mandates*, National Association of Counties, October 26, 1993.

¹⁵ *The Need for a New Federalism: Federal Mandates and Their Impact on the State of Ohio*, State of Ohio Washington Office, August 1993, p. iii.

¹⁶ *The Impact of Federal Mandates*, State of Tennessee Department of Finance and Administration, Division of budget, February 1993, text—p. 2.

¹⁷ *Analysis of Federal Initiatives and State Expenditures*, State of Texas Legislative Budget Board, June 15, 1994, p. 4.

¹⁸ Douglas P. Munro, *The Effect of Federal Mandates on Wisconsin State Government*, Wisconsin Policy Research Institute, September 1993.

¹⁹ Missouri H.C.S. H.B. 1109, et al.

²⁰ Michael D. LaFaive and Lawrence W. Reed, *Washington Should Kick the Mandate Habit: The Fiscal Impact of Medicaid Mandates on Michigan*, Mackinac Center for Public Policy, May 1993.

dates. But while some State and local officials are satisfied simply to have Federal mandates funded, others believe that many mandates represent an overreaching of the Federal Government's constitutional authority. Eight States (Arizona, California, Colorado, Hawaii, Illinois, Missouri, Oklahoma, and Pennsylvania) expressed this concern in 1994 by passing resolutions that assert State sovereignty under the 10th amendment. California's is typical: "The State of California hereby claims sovereignty under the 10th amendment to the Constitution of the United States over all powers not otherwise enumerated and granted to the Federal Government by the United States Constitution and that this measure shall serve as notice and demand to the Federal Government to cease and desist, effective immediately, mandates that are beyond the scope of its constitutionally delegated powers."²¹ Some 10th amendment resolutions argue further that the States authorized the Federal Government, not vice versa. According to the National 10th Amendment Committee, legislators in over 20 States plan to introduce similar resolutions next session. While mandate-relief and 10th amendment resolutions may have little or no legal force, they effectively publicize the problem and deliver a clear message to Congress.

(2) Congressional Delegation Mandates Consultation Acts

One particularly effective way States are publicizing the mandate problem is by passing "congressional delegation mandates consultation acts." Noting the recent explosion in Federal mandates and the consequent strain on State budgets, these acts "invite" the State congressional delegation to appear before a special session of the legislature to discuss the problem of unfunded Federal mandates. Initially, the idea was to invite the State's U.S. Senators, not its entire congressional delegation, to explain their votes on mandate legislation.²² The theory was that while the 17th amendment changed the election of Senators from election by State legislatures to direct election by the people, it did not change the legal principle of the relationship between U.S. Senators and their respective States. However, all the mandates consultation acts actually introduced invite the entire congressional delegation and the American Legislative Exchange Council's model legislation also invites the entire delegation.

Mandates consultation acts have been passed in seven States. Alabama led the way, adopting the innovative resolution in 1992 under the leadership of State Representative Perry Hooper. South Dakota followed in January 1993. Since then, Arizona, California, Delaware, Michigan, and Pennsylvania have adopted the act.

Alabama, South Dakota, Delaware, and Arizona have held, or attempted to hold, meetings with their congressional delegations. The other three States are scheduling meetings or have not yet followed up on the resolution. In Alabama all nine Congressmen participated in the meetings, and all nine signed on to the most far-reaching mandate-relief bills in the 103d Congress. Despite their participation in meetings, only one of the three in South Dakota's delegation supported a strong mandate-relief measure in 1994. Delaware tried unsuccessfully to schedule meetings, but two out of three from its delegation still supported substantial mandate-relief legislation in 1994. Six out of eight from Arizona's congressional delegation participated in a November 1994 meeting with the State legislature's Committee on Federal Mandates. All six promised to end unfunded Federal mandates on States. Concerned about meddling Federal judges, Senator-elect Jon Kyl (R-AZ) suggested in particular that "it may be time to invoke a little-used portion of the Constitution [article III, section 2] that allows the House and Senate to set the parameters of Federal judicial powers."²³

While State legislatures may not have the legal power to require the presence of Federal legislators, a Member of Congress who declines the invitation opens himself up to charges of "inside-the-beltway arrogance." If he accepts, he is not likely to argue for requiring his home State to pay for Washington's latest schemes. More likely, he will profess his faithful opposition to mandates on behalf of his beleaguered State. In any case, he is likely to think twice before voting for the next proposed unfunded mandate he encounters.

(3) Congressional Delegation Voting Reports

Another way to give States leverage over their congressional delegations is to conduct regular voting reports. In 1994, the Virginia House of Delegates expanded the duties of the Commonwealth's liaison office in Washington, DC, to include

²¹ California Senate Joint Resolution No. 44.

²² Andrew J. Cowin, "How Washington Boosts State and Local Budget Deficits," Heritage Foundation *Background* No. 908, July 31, 1992, pp. 14-15.

²³ Chris Coppola, "Lawmakers target Federal power over State," *Mesa Tribune*, November 17, 1994, p. B3.

"[r]eporting in a timely manner to the General Assembly all Federal mandates and regulations which may have an effect on the Commonwealth." The reports are to include "the names of those Virginia congressional Members who voted for such mandates and regulations."

In a similar effort to restore accountability, the Arizona-based Barry Goldwater Institute for Public Policy Research has developed a "mandate scorecard" for the U.S. Congress. The November 1994 report scores Members of the 103d Congress for their votes on selected unfunded Federal mandates and mandate-relief legislation. Those who voted with the States at least 75 percent of the time are termed "friends of the States," while those who voted with the States less than 25 percent of the time are labeled "foes of the States." Those who scored between 25 percent and 75 percent are labeled "neutral." According to the report, the highest-scoring "friends of the States" were Senators Hank Brown (R-CO), Larry Craig (R-ID), Judd Gregg (R-NH), Dirk Kempthorne (R-ID), Richard Lugar (R-IN), and Alan Simpson (R-WY); and Representatives Chris Cox (R-CA), Jennifer Dunn (R-WA), Thomas Ewing (R-IL), Tillie Fowler (R-FL), Porter Goss (R-FL), Joel Hefley (R-CO), David Levy (R-NY), Howard (Buck) McKeon (R-CA), Dan Miller (R-FL), Dana Rohrabacher (R-CA), Edward Royce (R-CA), and Bob Stump (R-AZ). The lowest scoring "foes of the States" were Senators Max Baucus (D-MT), Barbara Boxer (D-CA), Wendell Ford (D-KY), Howard Metzenbaum (D-OH), Donald Riegle (D-MI), and Paul Wellstone (D-MN) and Representatives John Dingell (D-MI), Sam Gejdenson (D-CT), Barbara Kennelly (D-CT), Jim McDermott (D-WA), Joe Moakley (D-MA), Ray Thornton (D-AR), Craig Washington (D-TX), and Maxine Waters (D-CA).²⁴

Mandate voting reports provide a political tool for holding Federal lawmakers publicly accountable for shrinking the share of State budgets available for local priorities such as education or police. As these reports become more sophisticated, it may become possible to calculate each Senator's or Representative's cost to State and local budgets.

MAKING THE FEDERAL GOVERNMENT PAY

The most conspicuous objective of the antimandates movement is to require the Federal Government to fund its mandates on States and localities. State and local officials have considered two approaches: supporting Federal mandate-relief legislation and intercepting Federal taxes.

Federal Legislation

The "Big Seven" national associations of State and local governments—National Governors' Association, National Conference of State Legislatures, U.S. Conference of Mayors, National Association of Counties, National League of Cities, Council of State Governments, and International City/County Management Association—have been lobbying Congress resolutely to pass effective mandate-relief legislation.

The Community Regulatory Relief Act (S. 993) introduced by Senator Dirk Kempthorne (R-ID) and the Federal Mandate Relief Act of 1993 (H.R.140) sponsored by Representative Gary Condit (D-CA) were strong bills that received widespread attention and support in 1994. Neither addressed existing mandates, but both would have required Congress to fund any new mandates imposed on State and local governments. Both bills had a majority signed on as cosponsors, but neither House's leadership allowed a vote. Congress also failed to vote on less restrictive bills negotiated by Senator Kempthorne and Senator John Glenn (D-OH) and by Representatives John Conyers (D-MI) and William Clinger (R-PA) (H.R. 5128). These bipartisan bills would have established a point of order requiring Congress to authorize funding of mandates whose estimated costs exceed \$50 million annually, unless the majority by roll call vote waive the point of order. The bills also would have required CBO cost estimates of private sector mandates exceeding \$200 million and executive branch consultations with State and local officials before writing Federal regulations.²⁵

Shortly after the election, incoming Senate Majority Leader Bob Dole (R-KS) promised Republican Governors that "the first bill in the Senate, S. 1, is going to be unfunded mandates." The 104th Congress' mandate-relief agenda will likely build upon and strengthen 1994's bipartisan bills—perhaps by requiring a three-fifths supermajority to waive the point of order; by lowering the \$50 million point-of-order

²⁴ John Berthoud, "The Federal Mandates Scorecard: In Search of Friends of the 10th Amendment," *Goldwater Institute Issue Analysis Report* No. 134, Barry Goldwater Institute for Public Policy Research, November 1994.

²⁵ Susan M. Eckerly, "Kempthorne's and Glenn's Welcome Bill to Curb Unfunded Federal Mandates," Heritage Foundation *Executive Memorandum* No. 395, October 4, 1994.

threshold; by requiring the appropriation, not just the authorization, of funding for mandates in order to avoid the point of order; or by allowing States and localities not to implement mandates for which funds have not been appropriated. Incoming Senate Judiciary Committee Chairman Orrin Hatch of Utah has indicated his intent to propose a "no money, no mandate" amendment to the Constitution. By offering it simultaneously with a Balanced Budget Amendment [BBA], he hopes to ease the concerns of States and localities which fear that a BBA would lead the Federal Government to balance its budget by imposing still more unfunded mandates on them. Governors strongly prefer that the two amendments be written as one.²⁶ State and local leaders also are likely to raise with the 104th Congress broader issues many considered it unrealistic to address in 1994—issues such as repealing or reforming existing unfunded Federal mandates, transferring Federal programs to States and localities, compelling Federal agencies to allow States greater flexibility in implementing Federal programs, and restricting Federal judges from directing State and local policies.

The Interception of Federal Taxes

One of the most aggressive approaches to fighting unfunded Federal mandates is the possible interception of Federal taxes as reimbursement for federally induced costs. For instance, South Carolina State Representative Ralph Davenport introduced a bill in 1994 instructing the State Budget and Control Board to devise a plan for intercepting Federal individual and corporate income tax payments made by South Carolina residents to compensate the State for the cost of unfunded Federal mandates. The idea had considerable support among legislators but failed to make it out of committee. A few States have considered intercepting Federal gasoline taxes in response to the burdensome Clean Air Act. In both cases, it is unclear how the State would manage the interception, considering that Federal income and gasoline taxes generally are paid directly by individuals and corporations to the Federal Government.

There is, however, at least one Federal tax States could intercept very easily: the Federal income taxes of State employees. Such moneys are already in the State treasury, and no collection procedure would have to be altered.

TO COMPLY OR NOT TO COMPLY

No State has acted to intercept Federal taxes, but many are resisting compliance with onerous Federal mandates, for example, by disputing Federal agencies' implementing regulations, by asserting the States' right to challenge the constitutionality of a Federal mandate and direct its implementation, through simple noncompliance, by opting out of Federal programs, and through return of primacy.

Negotiated Compliance

The courts have ruled that regulations set by Federal agencies have the same force of law as associated legislation. But some States argue that there is a difference between the performance standards set in congressional legislation and the fine print of the Federal bureaucracy's implementing regulations. Virginia's Secretary of Natural Resources, Becky Norton Dunlop, has used this argument to explain the opposition of Gov. George Allen's administration to the expensive, centralizing emission inspection systems the Federal Environmental Protection Agency insisted Virginia use to comply with the Clean Air Act: "Once we had reviewed the law and determined that the plan was not mandated by law but rather by unelected bureaucrats at EPA, we pulled the plan back and submitted a plan that met the performance standards of the Clean Air Act but was consumer friendly, more cost effective, and would result in real improvements in air quality."²⁷

More than a dozen States have resisted this EPA plan that requires "test-only" inspection stations and specified high-tech equipment costing \$150,000 at each site. Test-only stations have proven quite unpopular because they require drivers whose vehicles fail inspection to go elsewhere for the necessary repairs and then to return to the test station for reinspection. States also complain that the high-tech equipment is unreliable. Understandably, they want to devise their own system of compliance rather than have a one-size-fits-all approach imposed on them. They tend to agree with Columbus Mayor Greg Lashutka: "The Federal role should be one meas-

²⁶ Dan Balz, "GOP Governors Seek Shift in Power," the *Washington Post*, November 21, 1994, p. A9.

²⁷ Becky Norton Dunlop, "Virginia's Federalist Challenge," address to American Legislative Exchange Council 21st Annual Meeting, August 5, 1994, p. 6.

uring results: how much pollution is reduced, rather than prescribing how it should be done."²⁸

Until recently, however, EPA generally has responded to States' proposed alternate compliance plans inflexibly, frequently threatening to withhold Federal funds. Virginia's proposal, for example, imitated one of four methods for testing fleets that EPA itself had recommended to State governments in a 1993 memorandum.²⁹ Still, EPA dismissed it and threatened to withhold Federal highway funds. In explaining the rejection, EPA regional administrator Peter Kostmayer obligingly displayed what Governor Allen calls the Federal bureaucracy's "monarchical elitism": "We needed to get their attention," asserted Kostmayer. "The Governor has given every indication that he does not want to do it our way."³⁰ EPA officials further explained that if EPA approved Virginia's innovative plan, other States would want to reopen and renegotiate their plans.³¹

The States perhaps are beginning to have their way, however. The EPA is backing down from its rigid insistence on the test-only stations and expensive high-tech equipment. EPA Administrator Carol Browner recently announced that the agency would help States design alternative plans. Kostmayer is striking a more conciliatory tone: "Voters have sent a message that they want less confrontation and more cooperation. I think we can do a better job of that," he said recently.³² This case is a good example of the impact States can have on Federal agencies by focusing their resistance simultaneously on the same problem.

Noncompliance, Opting Out, and Return of Primacy

Simple noncompliance is another response to unfunded Federal mandates. Asserting they do not have the resources to implement the regulations, many law enforcement officials across the country are ignoring Brady Act gun control standards that require background checks on gun buyers.³³ Gov. Pete Wilson has announced that California will not implement "motor voter" sections of the National Voter Registration Act without Federal funding. In his August 26, 1994, executive order Governor Wilson stated that "California's motor voter program will be ready to go on January 1, 1995, but it won't go anywhere unless the Federal Government pays for the mandate they have imposed." At the time of Administrator Browner's recent announcement that the EPA would be more flexible about Clean Air implementing regulations, several States had announced they simply would not follow some of the specifications.

Serious compliance issues also have arisen over the Clinton administration's implementation of the liberalized Hyde amendment provision that allows Medicaid funds to be used to pay for abortions in cases of rape or incest. Some lawmakers, including Representative Henry Hyde (R-IL) himself, assert the new provision does not require funding for such abortions; it only allows it. Moreover, at the time of this change in the amendment, funding abortions, except when there is a threat to the life of the mother, violated 29 States' laws and constitutions. Nevertheless, the Clinton administration ordered States to fund rape and incest abortions. Many States threatened to ignore the order. Several States succumbed and are bringing their laws into compliance with the mandate. Eleven States—Arkansas, Colorado, Indiana, Kentucky, Louisiana, Michigan, Mississippi, Montana, North Dakota, South Dakota, and Utah—were threatened with loss of Medicaid funds if they did not comply. Faced with such widespread opposition from State officials, the Federal Health Care Financing Administration [HCFA] has allowed some flexibility regarding how long States take to comply, although it continues to insist that States fund rape and incest abortions. Considerable legal action is still pending.

The salient point in this last example is that similar situations are predictable outcomes of Federal strings-attached programs: States succumb to the temptation of Federal funds and buy into a program; the people and the State become dependent on it; Congress changes the rules of the game; and the State is directed actually to change its law or even its constitution in order to continue receiving the popular funding. Strings-attached programs can lead to the Federal Government's virtually

²⁸Gregory S. Lashutka, "Local Rebellion: How Cities Are Rising Up Against Unfunded Federal Mandates," *Commonsense*, Vol. 1, No. 3 (Summer 1994), p. 72.

²⁹Lorraine Woellert, "Virginia fumes on emissions: EPA rejected plan similar to its own," the *Washington Times*, August 9, 1994, p. A-1.

³⁰Peter Baker, "EPA Warns Virginia on Air Quality," the *Washington Post*, June 3, 1994, p. A1.

³¹Dunlop, "Virginia's Federalist Challenge," p. 7.

³²D'Vera Cohn, "EPA Yields to Governors on Auto Emissions Tests," the *Washington Post*, December 10, 1994, p. B1.

³³Nancy E. Roman, "Fed-up States seize on the 10th amendment," the *Washington Times*, July 7, 1994, p. A-8.

dictating State law. Yet, all too often, States have been quick to bargain away their autonomy in pursuit of Federal dollars. They responded no differently to 1994's temptation, the crime bill's prison construction money. Most State and local officials who took a public position supported this centralizing bill, despite the additional \$28 billion liability it imposes on the States and the greatly increased Federal intrusion it allows into States' criminal justice systems.³⁴ "No doubt," argues Edward Zelinsky, former alderman and member of the board of finance of New Haven, CT, "most mayors and city council members feel they have no choice but to accept any law enforcement assistance offered by Federal and State governments. However, I suggest an alternative course: Municipal officials should respectfully, but firmly, refuse such assistance and demand mandate relief instead."³⁵

States should consider opting out of Federal strings-attached programs. Studying which Federal programs are the best prospects for this would be a worthy project for mandates auditor offices and nonprofit research institutes. In 1992, as Medicaid costs were rising at nearly 14 percent a year and consuming a huge proportion of the State budget, Colorado legislators actually considered opting out of Medicaid and implementing their own Medicaid-style program. In a bipartisan effort, both houses of the legislature passed a bill that would have charged a joint budget committee with studying this possibility. Even with the prospective loss of Federal funding, Colorado lawmakers felt they could manage their own system in a more cost-efficient manner. Despite their efforts, Gov. Roy Romer, apparently uncomfortable with such sweeping reform, vetoed the bill.

Another rarely used option is to turn over State-administered Federal programs, or parts of such programs, to Federal agencies. This "return of primacy" allows State agencies to forfeit, for an indefinite period of time, programs which prove too burdensome to administer. Once surrendered, these programs are funded and enforced by the Federal Government. Iowa, for example, returned primacy over Resource Conservation Recovery Act [RCRA] hazardous waste inspection and permits to the EPA in 1985. The State department of natural resources, despite its successful implementation of the program with 15 employees, was told by EPA that it had to dedicate 15 more employees to the permit and inspection process in order to come up to standard. The State determined that compliance with this arbitrary standard was not worth the expense. According to an official in the Iowa Environmental Protection Division, EPA now administers the program with no more than two employees working from the EPA regional office. As one might expect, the EPA does not have the resources to administer that which it requires of the States. More widespread return of primacy would help expose the unrealistic burden EPA and other agencies place on States by forcing the Federal Government to be accountable to its own regulations. There are downsides to return of primacy, however. For instance, State-level administration of regulatory programs tends to yield a friendlier, more flexible and responsive environment for citizens and businesses. But States may regain primacy at any time.

Colorado's Federal Mandates Act. Colorado's Federal Mandates Act (senate bill 94-157) is one of the sternest and most comprehensive responses to unfunded mandates to date. The bill is intended "to ensure that Federal mandates implemented in Colorado comply with State policy as established by the general assembly." Most important, it asserts Colorado's right to determine the constitutionality of any federally mandated program, prohibits any State appropriations unless the Federal program meets the State's established criteria, and establishes programs and principles for the development of legal theories and legal action to oppose Federal mandates. The bill declares the State's primacy in directing the implementation of federally mandated programs and puts State employees involved in implementing these programs on notice that they report to the State, not to the Federal Government. It argues that the "burden to prove the insufficiency of the State's efforts to implement Federal requirements [should be] shifted to the person or agency who asserts such insufficiency." In other words, Colorado should not be required to prove that its implementation plan for a mandated program is sufficient; rather, before it can require a plan's alteration, the Federal Government should have to prove that the plan is insufficient. Colorado's Federal Mandates Act lists 19 of the most egregious unfunded Federal mandates and criticizes Federal mandates for failing to reflect the realities of the Rocky Mountain region, for not allowing the State sufficient flexibil-

³⁴Scott A. Hodge, "The Crime Bill's Faulty Math Means a \$28 Billion Unfunded Liability to the States," Heritage Foundation F.Y.I. No. 29, August 16, 1994, and Scott A. Hodge, "The Crime Bill: Few Cops, Many Social Workers," Heritage Foundation *Issue Bulletin* No. 201, August 2, 1994.

³⁵Edward Zelinsky, "Mandates and Cops: The Unspoken Connection," *Governing*, November 1994, p. 13.

ity, and for not respecting the rights of the State, its local governments, and its citizens.

LEGAL ACTION

States also are taking various kinds of legal action against unfunded mandates. They are commissioning offices to study possible legal action; they are suing the Federal Government, using 10th amendment and other constitutional and legal arguments; and they are suing the Federal Government for reimbursement for the costs of mandated programs for illegal immigrants.

Constitutional Defense Councils

In response to Gov. Fife Symington's proposal in November 1993, the Arizona legislature was the first to commission a "Constitutional Defense Council" to direct the study, initiation, and prosecution of appropriate legal action aimed at "restoring, maintaining, and advancing the State's sovereignty and authority over issues that affect this State and the well-being of its citizens." Meetings and hearings will examine "Federal mandates; court rulings; the authority granted to, or assumed by, the Federal Government; laws, regulations, and practices of the Federal Government; and any other activity deemed appropriate given the purposes of the council." The council has the authority to direct the attorney general to take appropriate legal action. Its million-dollar budget will fund the hiring of qualified attorneys to research and prosecute the cases.

Several other States also are studying possible legal action. Utah has established a constitutional defense council based on the Arizona model. Within the last year, Colorado, Hawaii, and Maine have directed their attorneys general to investigate legal action to challenge unfunded Federal mandates.

Resuscitating the 10th Amendment

While 10th amendment jurisprudence in the post-New Deal era has not been favorable to State autonomy, efforts to restore a more balanced understanding of federalism in the courts are mounting. One encouraging sign came in the Supreme Court's 1992 decision, *New York v. United States*, in which the Court sided 6-3 with New York's argument that it had been "commandeered to do the government's regulation" by a Federal requirement to dispose of low-level nuclear waste. Deciding on 10th amendment grounds, Justice O'Connor wrote for the majority that "No matter how powerful the Federal interest involved, the Constitution simply does not give Congress the authority to require the States to regulate."

A similar suit, *Missouri v. United States*, filed in July 1994 by Missouri Gov. Mel Carnahan, addresses congressional and EPA authority with regard to punitive sanctions within the Clean Air Act. Penalties imposed on nonattainment include the withholding of Federal highway funds and "offset" rules which effectively halt economic development in the region and, if the EPA wishes, in the entire State. Missouri claims these regulations conflict with the 10th amendment and the spending clause. Like New York, the Missouri suit claims that "Congress has effectively commandeered the legislative process of the States by compelling them to implement regulatory programs. * * * "But *Missouri* would take *New York* a step further by broadening the concept of "impermissible congressional compulsion" to include the threat of withheld Federal funding. 10th amendment challenges also have arisen in response to Federal gun-control mandates contained in the Brady Act, which imposes duties on local law enforcement officials such as background checks on gun purchasers and is being challenged in several courts around the country. A Montana Federal district court judge, for example, struck down part of the law, citing *New York v. United States*.

Another related constitutional issue being considered in the courts is reliance on the commerce clause as the basis for congressional legislation.³⁶ The expansion of Congress' commerce clause powers throughout most of American history has been one of the major causes of the erosion of State powers. Today it is claimed as the authority for approximately 97 percent of all Federal legislation. At issue in a circuit court decision the Supreme Court recently heard—*United States v. Lopez*—is whether Congress has constitutional authority under the commerce clause to ban the possession of guns near schools under the Gun Free School Zones Act. The connection between interstate commerce and the possession of guns near schools is indeed difficult to discern. The *Lopez* decision, which is expected early 1995, will be a strong indication of how much the present Supreme Court wants to correct the imbalance in America's federalist system. Seven national associations of State and local gov-

³⁶ Glenn Harlan Reynolds, "Kids, Guns, and the Commerce Clause: Is the Court Ready for Constitutional Government," *Cato Institute, Policy Analysis* No. 216, October 10, 1994.

ernment officials—including the National Conference of State Legislatures, National Governors' Association, and National League of Cities—filed an *amicus curiae* brief arguing against such sweeping commerce clause authority for Congress.

Immigration Lawsuits

Governors in Florida, California, Texas, and Arizona have filed suit against the Federal Government for costs their States have incurred from illegal immigrants. The Federal failure to secure the borders against illegal immigration has resulted in substantially increased costs to these four States in particular. Strictly speaking, not all these costs are unfunded Federal mandates. States always have been obliged to prosecute and incarcerate criminals, whether they are illegal immigrants or not. Such costs, because they are not federally mandated in the same sense that safe drinking water standards or motor voter compliance are, constitute a "cost shift." Attorney General Janet Reno has responded to the California suit by promising a small partial reimbursement for the State's incarceration of illegal immigrants. The Immigration Reform and Control Act of 1986 provides for Federal reimbursement for such expenses, but this will be the first time funds actually have been appropriated for this purpose.

State costs of educating and providing health care to illegal immigrants, on the other hand, are federally mandated. The Omnibus Budget Reconciliation Act of 1986 requires States to reimburse hospitals for expenses incurred in caring for uninsured illegal aliens. The requirement that States cover the education costs for illegal immigrants is mandated by the Supreme Court's *Plyler v. Doe* decision. California estimated that illegal immigrants will cost State taxpayers \$3.4 billion in 1994, including \$1.9 billion in unfunded Federal mandates (education and health services) and \$474 million for incarceration. Adjusting for taxes paid by illegal immigrants, California estimated its net loss will still be \$2.7 billion.³⁷ These figures do not include the costs of providing services to the children of illegal immigrants.

AMENDING THE CONSTITUTION

Some State officials believe that States ultimately will have to take constitutional action to establish reliable protection against federally induced costs. Kansas and South Dakota have passed resolutions calling for a constitutional convention to pass an amendment that would prohibit unfunded Federal mandates on States. However, there are some in the antimandates coalition who wonder just how limited a "limited" constitutional convention might be. They are concerned about the possibility of a "runaway" convention that would dramatically alter the Constitution, despite the fact that even a constitutional convention may propose only amendments that must be ratified by the States. These people are not likely to be satisfied even by South Dakota's language stipulating that its application should "be deemed null and void, rescinded, and of no effect in the event that such convention not be limited to such specific and exclusive purpose."

A Conference of the States

Utah Gov. Mike Leavitt has offered a proposal that may make this a moot point. Leavitt's "Conference of the States" proposal, if successful, would demonstrate to Congress the States' ability to conduct a constitutional convention while avoiding the controversy and risk (to whatever extent it exists) of an actual convention. Governor Leavitt and his Democratic partner, Nebraska Gov. Ben Nelson, intend this Conference of the States to address "one narrow purpose"—the development of "an agenda or action plan that would give States leverage to compete in the Federal system, ultimately restoring balance between the States and the National Government. The action plan could consist of legal strategies, carefully crafted amendments to the U.S. Constitution, or other components."

In response to this proposal, the National Governors' Association and National Conference of State Legislatures have formed a task force to consider a conference of the States as one possible device for organizing "collective State action, concentrating State power, and focusing national attention on federalism." The American Legislative Exchange Council also has indicated interest in the proposal. Governors Leavitt and Nelson are determined that the effort remain bipartisan and focused solely on Federal-State relations.

According to Governor Leavitt's plan, the conference would be preceded by a series of "federalism summits." The agenda for the conference of the States would be drafted at these meetings of State and local leaders and analysts. To convene the

³⁷ Philip J. Romero and Andrew J. Chang, *Shifting the Costs of a Failed Federal Policy: The Net Fiscal Impact of Illegal Immigrants in California*, Governor's Office of Planning and Research, California Department of Finance, pp. viii-xi.

conference, each State would send a delegation, most likely legislators and Governors. If any States were unable to pass resolutions authorizing a delegation, individual legislators would represent their States on their own. The action plan resolved by the conference would be reported back to the legislatures. If three-quarters of the States formally endorsed the plan, it would be particularly difficult for Congress to ignore. If Congress did not submit the conference's proposed amendments to the States for ratification, the option of calling for a constitutional convention remains open. Says Governor Leavitt, "Supporters of this proposal hope and believe that such dire action as calling a constitutional convention would not be necessary. But the threat must exist to motivate Congress to act."

The States' Initiative and the States' Veto

At the November 1994 Republican Governors' Association meeting in Williamsburg, Governor Allen proposed a constitutional amendment with two complementary parts: the States' initiative and the States' veto. As described in the Governor's Executive Order No. 37, the proposed amendment would enable States to amend the Constitution or to overturn Federal legislation without either a constitutional convention or congressional or judicial action: "Under the proposed States' initiative, if three-quarters of the States approve a proposed amendment within a specified time period, and if Congress thereafter fails to override the States' action by a two-thirds vote of the Senate and the House of Representatives, then the State-initiated action would become part of the Constitution."³⁸ The States' veto would enable three-quarters of the States to repeal objectionable Federal legislation or regulations unless Congress overrides the States' action by a two-thirds vote of both houses.³⁹

CONCLUSION

As much as excessive taxation, wasteful spending, and picayune regulation, the centralization of power in Washington threatens to smother America's enterprise and liberty. The States have the power, the authority, the opportunity, and the responsibility to rein in an out-of-control Federal Government. Successful efforts to end unfunded Federal mandates and restore balance to America's intergovernmental system will transfer decisionmaking to levels of government more accessible and, therefore, more accountable to the people—namely, State and local governments. States and localities are leading the fight against Federal encroachment by a variety of means: educating the public; publishing mandate cost studies; holding Federal lawmakers personally accountable to their constituents; challenging Congress' authority to impose mandates; resisting or refusing compliance with Federal micromanagement; suing the Federal Government; working with each other to lobby Congress and plan strategies to restore balance to Federal-State relations, including constitutional amendment strategies and more. The sleeping giant in American governance—the States—has reawakened. It is a force that can moderate, if not tame, the Federal leviathan.

³⁸ Commonwealth of Virginia Executive Order No. 37 (94), p. 5.

³⁹ The order also calls for educating the public on Federal usurpation of State and local prerogatives; suing the Federal Government for 10th amendment violations; supporting Federal legislation to prohibit unfunded Federal mandates; organizing collective State actions to combat Federal intrusion into State and local jurisdictions; and assembling a Conference of the States to adopt an agenda to reinvigorate federalism. The order also formed the Governor's Advisory Council on Self-Determination and Federalism to advise the Governor on federalism, his initiative, and related issues.

Mandate-Related State Action and Legislation

	Mandates Consultation Acts	Voting Reports	Mandate Auditor	Cost Studies	Mandate Related Resolutions	Tenth Amendment Sovereignty Resolutions	Return of Primary	Constit. Defense Councils	Resolutions for Constit. Amendment	Lawsuits	Federal Mandates Bill
Alabama	HJR 51				HJR 162						
Arizona	SCM 1013 SB 1257					SB 1257		HB 2371		✓	
California	AJR 50					SJR 44				✓	
Colorado				SB 94-157	HJR 1035	SB 94-157 HJR 1035					SB 94-157
Delaware	HJR 2										
Florida					SM 1818					✓	
Hawaii					SR 117	HCR 106					
Illinois					SR 1379	SR 1279					
Iowa							RCRA				
Kansas					HCR 5030				SCR 1620		
Kentucky					HR 40 SJR 13						
Maine					HJR 1376 W-1508						
Michigan	HCR 232										
Missouri			HB 1109	HB 1109		HCR 27				✓	
Montana					91-SJ 2 93-SJ 3						
New Hampshire					HJR 22						
New York										✓	
Ohio				Governor & City of Columbus							
Oklahoma					SCR 30	HR 1056					
Penn.	HR 106					HJR 106					
South Dakota	SB 9								SJR 3		
Tennessee				Dept. of Finance & Admin.							
Texas				Legisl. Budget Board						✓	
Utah								HB 276			
Virginia		HB 892									

Note: Table refers only to enacted legislation.

Ms. DUNLOP. Apart from unfunded mandates, I can guarantee you that States and localities do a better job of solving environmental problems than the Federal central government can do or has done.

Another example of this is the Superfund Program. The Superfund Program has spent enormous dollars requiring enormous amounts of Federal bureaucrats' time, State dollars and State bureaucrats' time and local citizens' time, as well as businesses' time; but they have no substantive burden of proof to meet indicating that anyone is threatened with harm. Superfund functions as police, judge, and jury. Because of that, the average Superfund cleanup takes 12 years and costs about \$30 million.

They have no budgetary restraint on how much spending they can require.

Given these figures, you won't be surprised to learn, I am sure, that Superfund has cleaned up less than 20 percent—less than 20 percent—of the 1,200 supposedly hazardous sites it has identified over the years. In Virginia, two sites have been remediated, neither by work done by the Environmental Protection Agency; both by natural causes.

We have advocated before other congressional committees that the Superfund Program be reformed. You can reduce the budget but send the program back to the States and get the central government out of it.

Mr. Chairman, in conclusion this morning I would like to say that we, as Americans, face many pressing foreign and domestic problems, as we always have and we always will. But nothing is more important for us to put right than our tradition of federalism. Should we lose that overarching strategic battle, our victories at the tactical level won't amount to much in the long run.

Virginia is ready to deal with the new challenges if Congress will simply step out of the way, let the States work with the localities and with our citizens to deal with the challenges that are facing us in the areas that the Founders gave the prerogatives to the States.

Mr. Chairman, I have further inserted in my written remarks some examples of the challenges that we are dealing with in Virginia, and I would surely be happy to respond to any questions you or members of the committee might have.

Chairman KASICH. Thank you.

[The prepared statement of Becky Norton Dunlop follows:]

PREPARED STATEMENT OF THE HONORABLE BECKY NORTON DUNLOP, SECRETARY OF
NATURAL RESOURCES, COMMONWEALTH OF VIRGINIA

Mr. Chairman, members of the committee, good morning. Thank you for inviting me to address this hearing on federalism by the Budget Committee.

It is a pleasure to discuss federalism with you, this indispensable concept by which to a greater or lesser degree Americans have governed themselves for over 200 years. Able scholars have penned many learned treatises on the complexities of federalism, but, at bottom, the term refers simply to a constitutional structure that stipulates how governmental power will be dispersed. The very essence of federalism consists in reserving a certain degree of sovereignty for each of government's constituent parts. All federations are designed to make impossible the full concentration of jurisdiction and power in the central government. To the degree that power does become concentrated in one or another of government's constituent parts, well, to just that degree our self-determination is undermined and tyranny becomes a greater and greater hypothetical possibility.

Tyranny. The very word makes all Americans—Republican, Democrat, independent, liberal and conservative—nauseous. It always has and, Lord willing, it always will. To fend it off the Founding Fathers, who had seen quite enough of it, constructed an elaborate system of checks and balances that would impede any portion of government from gaining a monopoly of power, from riding roughshod over the other portions, and by extension over the people, in whose name and by whose authority government exists and acts.

Without going into great detail, I will simply note that the Founding Fathers divided the power of the central, or national, government into three constituent parts—the executive, the legislative, and the judiciary. Balanced against these three components of the central government they placed the States, and ultimately, the people themselves. Though this relationship is implicit throughout the text of the Constitution, it finds explicit recognition in the 10th amendment to our Bill of Rights which states with stark—and one would have thought unmistakable—clarity:

"The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

Mr. Chairman, it was provisions like this that prompted British Prime Minister William Gladstone to remark that the American Constitution is "the most wonderful work ever struck off at a given time by the brain and purpose of man." As a representative from Virginia, I take special pride in recalling Thomas Jefferson's boast to an uncomprehending European, "Here, Sir, the people govern."

Suggesting the need to provide for a balanced distribution of power, yet another Virginian, Patrick Henry, urged that something like the 10th amendment be added to the Constitution and explained: "If there be a real check intended to be left on the Congress, it must be left in the State governments * * * Human nature never will part with power. Look for an example of voluntary relinquishment of power from one end of the globe to another. You will find none."

Unfortunately, the federalism built into the Constitution and spelled out so explicitly by the 10th amendment has been under relentless attack for at least the last 60 years. Over time and under pressure to martial all our forces to fight first a hot war against fascism totalitarianism and then a long, costly complicated cold war against Communism totalitarianism, Americans have grown accustomed to a Big Nanny central government taking the lead, issuing orders, and doling out benefits. Though many Americans have been awakening to this constant usurpation of power, many more have not, and incredibly enough, some even view as unpatriotic any efforts to rein in the power of the central government, to set right the tilted balance.

But, in fact, as Jefferson, Henry, and virtually all of the Founders would agree, it is the heart of patriotism to insist on a central government whose powers are limited, are indeed enumerated. Why? Because to regard the immense expansion of the central government's power "intrusive" is to understate the case.

Today there is scarcely any human activity—with the possible exception of day-dreaming—that the central government does not attempt to manage, to regulate, in a word, to control. Often this is rationalized as the inevitable product of living in a more complex world than did the Founding Fathers. I myself doubt that the world is really all that much more complex or that the choices faced by our ancestors were really all that much simpler. In any case, it would surely have astounded and horrified the Founding Fathers to see how far we have drifted from the Federal system that they designed and bequeathed to us.

Lest anyone think I am exaggerating, listen to the words of James Madison—once a Virginian starts quoting Virginians there's just no stopping the torrent—who wrote in *Federalist* letter 43:

"The powers delegated by the proposed Constitution to the Federal Government are few and defined. Those which are to remain in the State governments are numerous and indefinite. The former will be exercised principally on external objects, as war, peace, negotiation, and foreign commerce; with which last the power of taxation will, for the most part, be connected. The powers reserved to the several States will extend to all the objects which, in the ordinary course of affairs, concern the lives, liberties, and properties of the people, and the internal order, improvement and prosperity of the State."

Does that sound to you like the political order that we live under today? Is it not entirely accurate to assert that the Framers' vision has been forgotten, neglected, even spurned? Thus, Mr. Chairman, I maintain to you and to the Committee that the single greatest reason to reinvigorate our moribund Federal system is that by doing so we will be taking a giant step toward reinvigorating the constitutional government that the Framers intended to protect our freedom. There are many additional reasons, of course, reasons that I will begin addressing presently. But, again, the rescue of constitutional government must be our top priority.

To move on. Sadly, one of federalism's greatest advantages—avoiding the danger of government by remote control from afar by out-of-touch officials, bureaucrats and staffers—has fallen by the wayside. Localities and States have lost much—very much—of the control that federalism guaranteed them, and with that loss has come apathy, cynicism, and despair among the citizenry.

No one has done a better job of summing up the unhappy situation that we find ourselves in today than Virginia's current Governor, George Allen, who must wrestle daily with an unending array of costly Federal regulations, restrictions, and mandates.

Governor Allen hosted 30 Republican Governors in Williamsburg just after the historic November 1994 elections and led the way in hammering out the Williamsburg Resolve—the text of which I am inserting into the record today—which forcefully argued that we must restore our largely vanished Federal system.

"Two centuries ago," Governor Allen has said, "the challenge to the liberties of Virginians came from an arrogant, overbearing monarchy across the sea. Today that

challenge comes all too often from our Federal Government that has defied, and now ignores, virtually every constitutional limit fashioned by the Framers to confine its reach and thus to guard the freedoms of the people."

Surely among the general developments that the Framers would most have lamented is the loss of marvelous flexibility provided by federalism. For 60 years we have witnessed a "one-size-fits-all" approach to countless regulations promulgated by unelected, virtually unaccountable, central government bureaucrats—not to mention the Federal judiciary. It is indeed ironic that just before this wholesale assault on federalism began, a Supreme Court Justice, Louis Brandeis, praised the States as the laboratories of democracy. How so? Because for most of our history they and the localities have not been fettered by interference from the central government. Instead, they have been able to try all sorts of experiments in accordance with the wishes of local constituencies, without forcing anything on other States, regions or localities who may have ideas of their own.

Mr. Chairman, from sea to shining sea, fed-up Governors, mayors, county officials, State legislators, and concerned private citizens have begun working together to resist the dreaded unfunded Federal mandate. You know how that constitutionally questionable beast wreaks havoc. States and localities are, in effect, blocked from setting their own priorities and from taking care of their needs as they see them, and instead are compelled to pay for costly programs emanating from Washington, DC, more often than not at the behest of some special interest constituency that has little or nothing to do with the State or locality in question.

Still worse, many local governments are forced to raise taxes to pay for what the central government desires and mandates but is unwilling to take financial responsibility for. States and localities are thereby reduced, in effect, to administrative units of the central government. I can tell you that where natural resources are concerned this is a major problem, but it doesn't stop there. Unfunded Federal mandates are crippling States where health care is concerned, where welfare is concerned, where education is concerned and where so-called environmental protection is concerned. The list is nearly endless.

Indeed, the U.S. Conference of Mayors has estimated that unfunded Federal mandates consume almost 12 percent of locally raised revenues. Similarly, the Congressional Budget Office estimates that regulations imposed on local governments during the 1983-1990 period cost about \$12.7 billion. In 1993, Ohio released a comprehensive study identifying the burdens placed on the Buckeye State imposed by unfunded mandates. Mr. Chairman, you're from Ohio so you are aware of how badly your home State is being damaged by these mandates. You know that these mandates cost \$356 million in 1994 and over \$1.74 billion between 1992 and 1995. And that's just one State. Unfunded mandates will cost the Nation's cities and counties nearly \$88 billion between the years 1993 and 1998. That's about one-quarter of all locally raised revenue. To bring all this quite literally home, Columbus, OH, has estimated that 14 environmental mandates will cost that city \$1.6 billion over the next decade. Now, listen to this—that represents a cost of \$856 dollars per year for every household in Columbus for the next 10 years. Similarly, Aurora, CO, estimates that it will have to repair 28,000 curbs in order to comply with the Americans With Disabilities Act—at an average cost of \$1,500 per curb.

Simply stated, our States and localities can't endure these whopping indirect taxes. Our fiscal backs are being broken, and we find ourselves struggling to meet our legitimate obligations to fund such needs as law enforcement and transportation. I know that Congress took some limited action to provide relief against future unfunded mandates. We thank you, and we hope that our allies in Congress will apply the act rigorously when foes of federalism propose new mandates.

But I would also urge you to take a good hard look at those mandates already on the books—many of which are in dire need of overhaul or repeal. Their doubled-edged burden is felt not only by the States and localities who must implement them, but also by the Federal Government, which devotes countless hours and countless dollars to micromanaging our compliance.

Let me draw on my expertise as Virginia's Secretary of Natural Resources and talk to you about one source of many unfunded mandates, the Environmental Protection Agency. (Indeed, so egregious was one EPA demand that the State of New York pay enormous expenses for cleaning up Federal nuclear wastes that Gov. Mario Cuomo—no foe of a powerful central government—sued the U.S. Government and won, proving that there's still some life in the 10th amendment.) But take EPA's enforcement of the Safe Drinking Water Act. Under this law EPA must identify 25 new substances every 3 years that localities must then test their water supplies for. What has happened in practice is that cities from coast to coast are being forced to bear the cost of testing their drinking water for substances that have been

banned for years. Not surprisingly, this has driven up the cost for localities astronomically.

Incidentally, one of my favorite horror stories of how badly out of whack things have gotten involves Anchorage, AK. That city's sewage inflow was so clean that the municipality could not meet the Federal requirement that all sewage treatment facilities reduce incoming organic wastes by at least 30 percent. Nevertheless, the EPA insisted with all the force of law behind it that Anchorage meet this arbitrary standard dreamed up in Washington. So what did Anchorage do? It arranged for two local fisheries to dump fish viscera into the river so the city could remove them. (See record insert from Heritage Foundation *Background*, December 28, 1994, entitled "Home Rule: How States Are Fighting Unfunded Federal Mandates," p. 13.)

Apart from the unfunded mandates issue, I can guarantee you that States and localities do a better job of solving environmental problems than the EPA ever has or will. Take its once vaunted Superfund Program. Under the laws governing the Superfund, the EPA has no substantive burden of proof to meet indicating that anyone is threatened with harm. Superfund functions as police, judge, and jury. It need meet no rules of evidence, and there is no real budgetary restraint on how much spending can be required. Because of that the average Superfund cleanup takes 12 years and costs about \$30 million. Given such figures, you won't be surprised to learn that Superfund has cleaned up less than 20 per cent of the 1,200 supposedly hazardous sites it has identified over the years.

Mr. Chairman, in conclusion, I'd like to say that we as Americans face many pressing foreign and domestic problems as we always have always will. But nothing, by my lights, is more important for us to put right than our tradition of federalism. Should we lose that overarching strategic battle, our victories at the tactical level won't amount to much in the long run. I'm ready now to address any specific questions that you might have.

VIRGINIA, GOV. GEORGE ALLEN, AND FEDERALISM

If I may I'd like to now examine more closely how federalism issues have been playing out in my own State since Gov. George Allen took office in January, 1994. Toward that end I'd like to note that Virginia's Gov. George Allen has recognized that the effort to revivify federalism is one of the most important struggles of our time.

Since taking office in January 1994, Governor Allen has been one of the most energetic proponents of a renewed federalism to emerge in decades, even to the point of authoring the *Williamsburg Resolve* of 1994 in which Republican Governors demanded that many powers now exercised by the central government be returned to the States. He has also championed the new interest in the 10th amendment by means of a special commission, The Advisory Council on Self-Determination and Federalism, which it is my privilege to chair. The commission is studying, among other things, how States might regain the powers, jurisdictions, and responsibilities that have been usurped by the central government.

One of the most intriguing measures backed by Governor Allen and many of us who are striving to revivify federalism is a constitutional amendment providing for the "States' veto."

ESSENTIALS OF THE STATES' VETO

Many federalism proponents believe that a supermajority of the States, either three-fourths or perhaps two-thirds, should be empowered to act in concert by passing resolutions in their legislatures to repeal or void Federal laws or regulations that they deem wrongheaded. Their collective verdict would stand unless overridden by a two-thirds vote of each congressional Chamber. This, we believe, would place in the hands of the States an effective means of balancing their sovereignty against that of the central government. Perhaps, in the long run, the most potent feature of the States' veto would be the simple fact that it exists. That is, perhaps it would so inhibit Congress from further attempts to undermine the States that it might not ever actually have to be used.

The States' veto requirement for a supermajority of the States is a recognition that this is a very serious measure, indeed, in that it permits one sovereign, the States, to exert authority over another, the central government. Our Constitution already points the way in such matters. For example, it requires two-thirds of each house to override a Presidential veto, two-thirds of each house to propose a constitutional amendment before it goes to the people, and two-thirds of the Senate to impeach executive officers.

Naturally, since what we are all about is true federalism, there would be certain specific and well-defined areas which the States' veto would not apply to under any

circumstances. No law, for example, that directly addressed the national security of the United States or addressed a matter of foreign policy could be overturned by the States, since these are legitimate provinces of the central government. Hence, nothing involving the amount or direction of foreign aid, levels of defense spending, declarations of war, covert intelligence operations, or the functioning of intelligence agencies could be affected by the States' veto.

Some areas, however, where the States' veto might make a great difference for the better include the horrific Federal mandates, whether unfunded or not, that I mentioned in my oral testimony. These surely could be vetoed, and the tremendous burden that they place on the States, quite against their wills could be lifted.

In addition, States could strike provisions of Federal spending bills that require States to adopt specified Federal policies if they agree to accept Federal funds. Again, Federal laws that preempt State laws might be vetoed.

A final benefit of the States' veto would be to restore a level of power and accountability to State legislatures that was lost with the adoption of the 17th amendment that provides for the direct election of senators.

THE STATES' INITIATIVE

Governor Allen and many others also believe that America should now consider allowing States to initiate constitutional amendments, rather than requiring a constitutional convention at which such amendments might be proposed. In a way such a development is a natural counterpart to the above mentioned States' veto; this however would be more aptly thought of as the States' initiative.

Again, such a proposal would require three-fourths of State legislatures to have voted to approve a particular amendment. The new amendment would become law unless within a 2-year period the Congress rejected it by a two-thirds vote of each house. Thus, it would clearly be very difficult to amend the Constitution, but States would gain at least the hypothetical possibility of doing so. This new State power, some legal experts believe, might be the result of simply adding a clause to article V, a clause that would empower States to propose amendments.

SOME LESS DRAMATIC POSSIBILITIES

Both of the above mentioned measures are dramatic and extremely powerful ways to reempower the States vis a vis the central government. In that drama and powerful effectiveness lie both their strengths and weaknesses. Some have suggested that real progress could be made simply by the passage by the Congress of a simple statute that might be called the Federalism Act. This, for example, might require Congress to identify the constitutional sources of its authority when passing legislation, might reassert the need for prudent limits to be placed on congressional power, and might identify State laws, if only by category, that might be preempted by a piece of new Federal legislation.

Indeed, so frustrated have the States become at their transformation into mere administrative units of the central government, they have begun mounting legal challenges to Federal authority, often grounded in 10th amendment objections. In Virginia, for example, when the Environmental Protection Agency tried to mandate a highly centralized, burdensome automobile emissions inspection and maintenance program on the people of northern Virginia and threatened to withhold highway spending funds as a sanction, Governor Allen didn't hesitate to invoke the 10th amendment in challenging the constitutionality of this mandate in Federal court.

Similarly, he has challenged the constitutionality of EPA's rejection of Virginia's stationary source air pollution program because EPA demands that Virginia's court system operate according to EPA dictates. Governor Allen has also challenged the regional government dictates of the Ozone Transport Commission created by the Clean Air Act of 1990.

Another major court case launched to resist Federal meddling in the lives of Virginians came when the Clinton Justice Department all but declared war on the all-male Virginia Military Institute. Governor Allen instructed his Attorney General, Jim Gilmore, to resist via a legal case that the Supreme Court will eventually decide. In explaining why he won't give in Governor Allen stated, "VMI is doing a perfectly good job * * * [and] there's more at stake than just VMI. It's the right of we, the people of Virginia, to have our own higher education system as we see fit. * * *"

Legal challenges to the central government have been one avenue of resistance that Governor Allen and Virginia have traveled, but we have employed other methods as well. For example, we have long opposed the ever-growing Federal intrusion into education, traditionally a State concern. Governor Allen stunned Federal bureaucrats when he became the first Governor to call on his State to opt out of President Clinton's controversial Goals 2000 program, yet another instance of that nefar-

ious old vehicle of funneling Federal tax dollars into a State in exchange for control over what gets taught and how. Several other States have now followed his lead. He has explained that his unwavering stance in this matter is based on his commitment to federalism, warning that Virginia must not sacrifice the independence of our schools.

Similarly, not long ago he denounced surrendering local control of schools to an untested Department of Education program managed by unelected bureaucrats, the same bureaucrats who were fighting simultaneously fighting Virginia in court as part of their effort to nullify the ability of local school boards to expel students who beat teachers or who bring firearms and drugs to school.

Nor, I can tell you, did Virginia quietly submit in a dispute with the Clinton Department of the Interior over access to False Cape State Park, which adjoins a Federal wildlife refuge in southeast Virginia. We have resisted the efforts of Federal negotiators to get Virginia to settle for something less than permanent access to our own State park. Negotiations continue, but we won't capitulate.

Welfare reform is still one more area in which Governor Allen has crossed swords with backers of a large centralized government that administers everything from Washington, DC. He has, instead, sung the praises of block grants to the States, believing that Virginians are better capable of taking care of our own needy than legions of reputed "experts" can do from afar.

Though Virginia has clearly been aggressive in challenging Federal usurpation of its legitimate rights, Governor Allen has not treated the problem of needlessly costly and burdensome regulations as solely a Federal problem. In a move that I wish more States—and indeed the Federal Government itself would emulate—he issued Executive Order 15 which requires every State agency to review its regulations, as well as those imposed by the Federal Government. He admonished, "Regulations are not to be considered perpetual and will be subjected to regular reevaluation. * * *" This sweeping regulation review is now nearing completion and we can expect to see many excessive, or simply outdated, regulations to be terminated.

Another of Governor Allen's executive orders instructed all executive branch agencies to report federally imposed impacts by means of a Federal Interference Assessment form that is to be filed whenever a Federal law, regulation or other directive requires some action by the Commonwealth or otherwise hampers Virginia's ability to implement its own preferred State policy. These FIA's are intended to encourage relief, not merely to note problems. This relief may be sought in a variety of ways including congressional action, legal action, or some other way. At the very least they will play a large role in educating the public about the tremendous costs incurred by the Old Dominion when trying to implement Federal mandates.

So, you see, there is much we in Virginia have done, and I assure you we plan to do more.

Among the innovations we would like to see are Federal block grant consolidation, budget reform that would control the growth of entitlements, and indeed a Balanced Budget Amendment to the Constitution.

Federal welfare programs have wrought devastation on Virginia for at least a generation, and we firmly believe that a true reading of federalism would enable us to construct our own system without having to beg to be allowed to do so.

Since acquiring our waiver we have had great success by imposing real work requirements on recipients, by requiring children to attend school for families to get benefits, and by requiring unwed mothers to name the fathers so that we can find them and make them pay something toward their child's support.

Where health care is concerned, States must be protected from the practice of the central government shifting the costs of Medicaid exposure to them. We appreciate Congress revisiting the Boren amendment which courts have interpreted as requiring States to pay unrealistic Medicaid reimbursement rates and we hope for relief.

Devolution of the financing and administering of the employment security system to the States is another idea that Governor Allen would like to see implemented. Currently the Nation's unemployment benefits system is funded by State and Federal taxes on employees. The money collected is sent to Washington, but the program is administered by the States in strict compliance with Federal regulations. The problem is that the Federal Government's mandates do not always fit a State's needs. Further, the dual bureaucracies of the State and Federal Governments create waste.

Under a proposal by Governor Allen, the Federal tax would be eliminated. Benefit coverage for employees would remain the same, but the tax on employers would be lower. This "equal with less" can be accomplished because the States would be responsible for administering the entire program, and the Federal Government would not need a separate tax revenue to fund its bureaucracy. Obviously, the plan is more detailed than this description, but this will serve to illustrate how trusting the

States can provide for smaller government and lower taxes while still serving the citizens.

Finally, following Virginia's lead, Congress should undertake a serious, systematic cost/benefit analysis of all Federal regulations and modify or jettison any that are found to place undue burdens on the States and the people.

Any or all of the various proposals that I have mentioned this morning could be welcomed by those who embrace the federalism which guided our country for so many decades. It is important not to delay, and if challenged by backers of the status quo, let us reply in the words of James Madison, "The powers granted by the proposed Constitution are the gift of the people and may be resumed by them when perverted to their oppression and every power not granted thereby remains with the people and at their will."

Chairman KASICH. Mr. Lund.

STATEMENT OF NELSON LUND

Mr. LUND. Mr. Chairman and members of the committee, I am honored to be here this morning. I, too, have submitted a lengthier written statement for the record.

At this point in our history, serious reflection on the principles of federalism almost necessarily leads one to a certain distrust of Congress. Rather than trying to paper that over with a kind of false politeness toward the committee, I thought it might be more useful to say so right at the start and hope that candor would be viewed as an acceptable form of courtesy. At least I will try to avoid the kind of weaseling, Mr. Chairman, that one might expect from a congenital lawyer.

I begin with two propositions that were articulated by James Madison.

Chairman KASICH. Mr. Lund, could I ask you—we let Becky go through that. You have about six pages of very small—do you intend to read all of this?

Mr. LUND. No, sir. I have a very much abbreviated version of the written material.

Chairman KASICH. Wonderful. Thank you.

Mr. LUND. I begin with two propositions that were articulated by James Madison. First, "if angels were to govern men, neither external nor internal controls on government would be necessary." Second, that "in republican government, the legislative authority necessarily predominates."

I believe this implies that Members of Congress are the most dangerous people in America. Dangerous, I should emphasize, does not mean bad. In fact, Madison anticipated—correctly, I think—that Federal legislators would be, on the whole, superior to their State counterparts and to the general population with respect to three critical qualities: patriotism, wisdom, and love of justice.

But even if these qualities will always be disproportionately found in Congress, we won't get a body of angels; and, less obviously, we won't get an institution that is suited to make most of the important decisions about how to regulate the lives of our citizens. Instead, what we can expect to get is an institution that is very well-suited to making certain kinds of decisions.

In discussing the appropriate size of political jurisdictions, Madison observed that there is a tension between encouraging responsiveness in legislators and fostering parochialism. The Federal Constitution, he said, "forms a happy combination in that respect;

the great and aggregate interests being referred to the national, the local and particular to the State legislatures."

Madison might have added, though he did not, that this happy combination was something easier to describe in words than to maintain in practice. Nor has it proved as durable as Madison and the other Framers may have hoped. Powerful centripetal forces operating with relentless energy have caused the Federal Government to assume an increasingly intrusive authority over matters that were originally considered wholly within the power of the several States. Those forces remain in existence, and I believe that any opportunity to shift our institutions back in the direction of the Constitution's plan is likely to be fleeting. If something is to be done, it should therefore be done in a way calculated to create resistance to decentralization; and I will return to that point in a few moments.

As everyone knows, the main legal constraint on excessive centralization was supposed to be the constitutional principle of enumerated powers; but, as I am sure most of you know, the Supreme Court has virtually abdicated its role in enforcing this principle. I think that imposes a special obligation on Congress itself to be mindful of the Constitution's intended limits on the reach of its authority. But I also think the Constitution itself has proven to be defective in certain ways, and I would like to offer two closely related examples.

"The power to tax involves the power to destroy." Chief Justice Marshall's pithy dictum is as true today as it ever was, but recent developments suggest a somewhat wordier corollary that may be more urgently important, and I would frame that corollary as follows: "The power to tax covertly increases the temptation to tax destructively."

To see the value of this corollary, it helps to appreciate why Marshall's original dictum is not quite as frightening as it may sound. Because American legislators must impose some kind of tax to finance most of the benefits they distribute and because productive citizens eventually rebel at the polling booth against excessive taxation, the United States has enjoyed meaningful constraints on the growth of government. Those limits do not arise for the nature of things but from our written Constitution.

The principal safeguard against excessive government, of course, is the requirement that all legislators stand for reelection at fixed intervals. As the Framers of the Constitution recognized, however, that safeguard is inadequate. Accordingly, the Constitution contains important auxiliary precautions. Some of them are direct, while others arise from structural features in our system.

Unfortunately, recent decades have witnessed a development in the taste and the means for evading these constitutional inhibitions on the growth of the Federal Government. Among the most insidious mechanisms are tax-shifting devices that enable Congress to give things away without fully assuming the risks entailed in raising the taxes to pay for its beneficence.

The most obvious such device is deficit financing, which defers the necessity of raising taxes into the future when the political pain will fall on other officeholders. A less notorious, but no less malefic, device is the unfunded mandate, which allows the Federal

Government to force State legislators to raise the taxes needed to comply with a Federal decree. Unfunded mandates thus allow Congress to spend other people's money without the painful and restraining need to impose the corresponding taxes.

If it is obvious why covert taxation is more dangerous than taxation itself, I think it is not so obvious how it can be controlled. The Constitution does not include prohibitions against devices like deficit financing and unfunded mandates, and the indirect safeguards have manifestly proved insufficient.

I believe that a properly drafted constitutional amendment could provide meaningful constraints on covert taxation, but the prospects for that approach seem poor. What seems more likely, at least in the near future, is that Congress will try to reduce the current levels of Federal deficits and perhaps eliminate some existing unfunded mandates, thus allowing the States to reacquire some of the responsibilities that have been taken away from them.

That project raises one obvious set of questions and one that is not quite so obvious. The obvious questions have to do with choosing which current Federal activities can more appropriately be left to the States. The less obvious questions have to do with structuring the Federal withdrawal from certain activities in such a way that the withdrawal is likely to be durable.

I am not aware of any systematic research on this topic, so I am afraid that I can't do much more than flag the issue today. But I think it would be hard to overstate its importance, given the strong centralizing forces to which democratic republics are subjected and which we have certainly seen operating in our own country for most of this century. Any willingness by Congress to move in the opposite direction is likely to be short-lived, and we should expect strong counterpressures to emerge fairly quickly thereafter. For that reason, it becomes important to design any reforms in a way calculated to create real obstacles to their being undone.

Without any pretense of even scratching the surface, I can illustrate one example of what I have in mind. Whenever possible, it would be desirable to abolish the components of the Federal bureaucracy that have responsibility for the administration of certain programs that are being defederalized. Doing that will have two salutary effects. First, it will make the programs harder to crank up again simply by restoring the funding that had been curtailed earlier; and, second, it will eliminate what is often the most persistent and effective lobbyist for the program in question.

Simple and familiar techniques like this should be given special attention in contexts that implicate the principles of federalism. Beyond this, however, I believe that attention should be given to devising creative new techniques for insulating future Congresses from pressures to undo whatever successes the current legislature may have in restoring the balance in our Federal system. Such creativity would be an altogether fitting response to Tocqueville's warning that, "In the dawning centuries of democracy, individual independence and local liberties will always be the products of art. Centralized government will be the natural thing."

Thank you very much.

[The prepared statement of Nelson Lund follows:]

PREPARED STATEMENT OF NELSON LUND, PROFESSOR OF LAW, GEORGE MASON
UNIVERSITY SCHOOL OF LAW

FEDERALISM AND CONGRESSIONAL INCENTIVES

Mr. Chairman, and members of the committee, I am honored to have been asked for my views on the important subject of federalism.

At this point in our history, serious reflection on the principles of federalism almost necessarily leads one to a certain distrust of Congress. Rather than trying to paper this over with a kind of false politeness toward the committee, I thought it might be more useful to say so right at the start and hope that candor would be viewed as a genuine form of courtesy.

I. OVERVIEW

I begin with two propositions that were articulated by James Madison. First, "if angels were to govern men, neither external nor internal controls on government would be necessary."¹ Second, that "[i]n republican government, the legislative authority necessarily predominates."² I believe this implies that Members of Congress are the most dangerous people in America.

Not the worst people in America, but the most dangerous. In fact, Madison anticipated (correctly, I think) that Federal legislators would on the whole be superior to their State counterparts and to the general population with respect to three critical qualities: wisdom, patriotism, and love of justice.³ But even if these qualities will always be disproportionately found in Congress, we still won't get a body of angels. And, less obviously, we won't get an institution that is suited to make most of the important decisions about how to regulate the lives of our citizens. Instead, what we can expect to get is an institution that is well-suited to making certain *kinds* of decisions. In discussing the appropriate size of political jurisdictions, Madison offered the following analysis:

"It must be confessed that in this, as in most other cases, there is a mean, on both sides of which inconveniences will be found to lie. By enlarging too much the number of electors, you render the representative too little acquainted with all their local circumstances and lesser interests; as by reducing it too much, you render him unduly attached to these, and too little fit to comprehend and pursue great national objects. The Federal Constitution forms a happy combination in this respect; the great and aggregate interests being referred to the national, the local and particular to the State legislatures."⁴

Madison might have added, though he did not, that this "happy combination" was something easier to describe in words than to maintain in practice. Writing almost half a century later, Alexis de Tocqueville was impressed with how stable the combination had remained. That stability he attributed in large measure (though by no means exclusively) to what he saw as a genuinely novel device in our Constitution. When the 13 original States created our Federal system, they gave the new government the power not only to make laws but to administer them directly, without intermediation by the constitutive States. This idea, which seems obvious to us today, was actually so remarkable that Tocqueville was able to say that there was still no word for the resulting form of government, even several decades after it was put into place. He himself described what we have here in the United States, not as a Federal Government, but as an "incomplete national government."⁵

Unlike many of his contemporaries, Tocqueville believed that the greatest threat to our constitutional arrangements lay in a weakening of the Federal Government that might lead to a dismemberment of the union.⁶ As we now know, the War Between the States proved him right. But in the longer term, Tocqueville thought that the greater danger lay in the inherent tendency of democratic nations to concentrate power at the center.⁷ And he has proved right about that, too. It may be worth pausing for a moment to recall part of Tocqueville's explanation for the fragility of decentralized governmental forms:

"Not only is a democratic people led by its own tastes to centralize government, but the passions of all its rulers constantly urge it in the same direction.

¹ *Federalist* No. 51, p. 322 (C. Rossiter, ed. 1961).

² *Id.*

³ *Federalist* No. 10, p. 82.

⁴ *Id.* at 83.

⁵ *Democracy in America*, p. 157 (J.P. Mayer ed., 1969).

⁶ *Id.* at 363-95.

⁷ *Id.* at 671-74.

"It may easily be foreseen that almost all the able and ambitious men in a democratic country will labor constantly to increase the scope of social power, for they all hope sooner or later to control it themselves. It is a waste of time to demonstrate to such men that extreme centralization may be harmful to the State, for they are centralizing in their own interests.

"The only public men in democracies who favor decentralization are, almost invariably, either very disinterested or extremely mediocre; the former are scarce and the latter powerless."⁸

Because today's hearing is no doubt the result of disinterested conviction, Tocqueville's analysis suggests that any opportunity to shift our institutions slightly in the direction of the original constitutional plan is likely to be fleeting. It should therefore be done in a manner calculated to resist the relentless centripetal forces that Tocqueville identified. This is the most important suggestion I have to offer, and I will return to it.

The principal legal constraint on the centralizing forces of democracy was supposed to be the principle of limited and enumerated legislative powers, a principle reflected in article I, section 8 and reinforced by the 10th amendment. This has not worked. The courts have interpreted the provision giving Congress the authority to regulate interstate commerce so broadly that it became a license to meddle in virtually anything. The emblematic decision was a 1942 case where the Court upheld a law forbidding a farmer to grow wheat on his own farm for his own consumption.⁹ The rationale was that if lots of farmers did the same thing, the price of wheat moving in interstate commerce could be affected. It is easy to see that this rationale really has no limits. Last year, the Court did conclude, for the first time in 60 years, that there must be some kind of limit and that Congress had exceeded its authority under the commerce clause.¹⁰ It is too soon to know whether this case will prove to have anything more than academic significance, but there is certainly no reason to expect the Court to enforce anything remotely resembling the meaningful constraints that the Framers thought they had put in place originally.¹¹

For this committee's purposes, the Supreme Court's related jurisprudence of the 10th amendment is especially relevant. In 1985, the Court essentially retired from the role of enforcing constitutional restraints on the authority of Congress to invade the sovereignty of the States.¹² Part of the rationale for that conclusion was the Court's belief that the structure of the Federal system creates adequate *political* restraints. I have trouble believing that this claim could have been anything other than naive or disingenuous. But given that this seems to be the Supreme Court's considered position, two implications appear to follow.

First, because the Supreme Court has decided to abdicate its role in enforcing the Constitution, Congress ought to take its own role in interpreting the Constitution much more seriously than it sometimes does. It is not true, and never was, that Congress should simply allow the courts to decide what is and is not constitutionally permissible.¹³ But Congress' responsibility to restrain itself from overstepping its constitutional bounds becomes immeasurably more grave and pressing when the Supreme Court announces that it will no longer try to say what those limits are.¹⁴

Second, the Supreme Court's abdication means that especially serious consideration should be given to inventing new legal devices for controlling congressional expansionism. Constitutional amendments are the most obvious examples, but there may be other possibilities that would be of more interest to this Committee.

II. EXAMPLES

Although I have been critical of the Supreme Court's refusal to enforce the constitutional plan, I also think the Constitution itself has proven to be defective in certain ways. I'd like to offer two closely related examples.

"[T]he power to tax involves the power to destroy."¹⁵ Chief Justice John Marshall's pithy dictum is as true as ever today, but recent developments suggest a

⁸ *Id.* at 735.

⁹ *Wickard v. Filburn*, 317 U.S. 111 (1942).

¹⁰ *United States v. Lopez*, 115 S. Ct. 1624 (1995).

¹¹ *Cf. id.* at 1642-51 (Thomas, J., concurring).

¹² *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985).

¹³ For a more extended discussion, see Charles J. Cooper and Nelson Lund, *Landmarks of Constitutional Interpretation*, 40 Policy Review 10, 12-14 (1987).

¹⁴ As with the commerce clause, the Court has recently taken some very small steps away from the extreme position that it had seemed to adopt earlier. See *New York v. United States*, 112 S. Ct. 2408 (1992). Just as with the commerce clause, however, the basic "hands off Congress" doctrine remains firmly in place.

¹⁵ *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 431 (1819).

somewhat wordier corollary that may be more urgently important: "The power to tax covertly increases the temptation to tax destructively."

To see the value of this corollary, it helps to appreciate why Marshall's original dictum is not quite as frightening as it may sound. Legislators are naturally happy to give things away, and naturally unhappy when they have to take things away. No doubt this results partly from the magnanimous personalities with which successful politicians are often blessed, but it would be a mistake to overlook the effects of political ambition responding to identifiable incentives. The recipients of legislative largesse are more likely to contribute votes or other forms of support to generous law makers, while those who suffer deprivations are encouraged to support rival candidates. This creates a healthy dilemma that contributes to the maintenance of limited government. Because American legislators must impose some kind of tax to finance most of the benefits they distribute, and because productive citizens eventually rebel at the polling booths against excessive taxation, the United States has enjoyed meaningful constraints on the growth of government.

These limits do not arise from the nature of things, but from our written Constitution. The principal safeguard against excessive government is the requirement that all legislators stand for reelection at fixed intervals. As the Framers of the Federal Constitution recognized, however, this safeguard is inadequate. Accordingly, the Constitution contains important auxiliary precautions. The most direct and obvious safeguards include numerous specific limitations on government's power to interfere with individual liberties. But there are also indirect restraints, especially the division of power between the State and Federal governments and among the main components of the Federal Government.

Unfortunately, recent decades have witnessed a development in the taste and the means for evading these constitutional inhibitions on the growth of government. Among the most insidious mechanisms are tax-shifting devices that enable Congress to give things away without fully assuming the risks entailed in raising the taxes to pay for its beneficence. The most obvious such device is deficit financing, which defers the necessity of raising taxes (either directly or through inflation) into the future, when the political pain will fall on other officeholders. A less notorious, but no less malefic, device is the unfunded mandate, which allows the Federal Government to force State legislators to raise the taxes needed to comply with a Federal decree. Unfunded mandates thus allow Congress to spend other people's money without the painful and restraining need to impose the corresponding taxes.

If it is obvious why covert taxation is more dangerous than taxation itself, it is not so obvious how it can be controlled. The Constitution does not include prohibitions against devices like deficit financing and unfunded mandates, and the indirect safeguards have manifestly proved insufficient. I believe that a properly drafted constitutional amendment could provide meaningful constraints on covert taxation, but the prospects for this approach seem poor. What seems more likely, at least in the near future, is that Congress will try to reduce the current levels of Federal deficits, and perhaps eliminate some existing unfunded mandates, thus allowing the States to reacquire some of the responsibilities that have been taken away from them.

This project raises one obvious set of questions, and one that is not so obvious. The obvious questions have to do with choosing which current Federal activities can more appropriately be left to the States. I would leave those questions to be addressed by others who have more relevant expertise than I do. The less obvious questions have to do with structuring the Federal withdrawal from certain activities in such a way that the withdrawal is likely to be durable.

I am not aware of any systematic research on this topic, so I'm afraid that I can't do much more than flag the issue today. But it should be clear from my earlier remarks why I attribute great importance to it. Given the strong centralizing forces to which democratic republics are subjected, and which we have certainly seen operating in our own country for most of this century, any willingness by Congress to move in the opposite direction is likely to be short-lived. And we should expect strong counterpressures to emerge fairly quickly thereafter. For that reason, it becomes important to design any reforms in a way calculated to create real obstacles to their being undone.

Without any pretense of even scratching the surface, I can offer one example to illustrate the sort of thing I have in mind. Whenever possible, it would be desirable to abolish the components of the Federal bureaucracy that have responsibility for the administration of programs that are being "de-federalized." Doing this will have two salutary effects. First, it will make it harder to crank the programs up again simply by restoring funding that had been curtailed earlier. And second, it will eliminate what is often the most persistent and effective lobbyist for the program in question.

Simple and familiar techniques like this should be given special attention in contexts that implicate the principles of federalism. Beyond this, however, I believe that attention should be given to devising creative new techniques for insulating future Congresses from pressures to undo whatever successes the current legislature may have in restoring the balance in our Federal system. Such creativity would be an altogether fitting response to Tocqueville's warning that "in the dawning centuries of democracy individual independence and local liberties will always be the products of art. Centralized government will be the natural thing."¹⁶

Chairman KASICH. Dr. Gold.

STATEMENT OF STEVEN D. GOLD

Mr. GOLD. Thank you.

I am pleased to speak to you today about devolution and State governments. I recently assumed a position as codirector of a project at the Urban Institute that is going to monitor and assess the effects of the shift of responsibility from the Federal Government to State governments. We look forward to presenting our findings to Congress and others as they develop over the next 3 years, but today I am speaking only about my own views.

Devolution is a mixed blessing for States. The positive side of the ledger, the freedom to redesign programs and experiment, has been widely discussed. Less attention has been devoted to the potential disadvantages of devolution. Because there should be awareness of these potential pitfalls, my testimony will emphasize the possible downside of devolution, the risks it entails and the problems it may cause. But I want to stress that these negatives have to be balanced against the positive aspects of devolution.

In my written testimony, which I request be placed in the record, I emphasize three points:

First, devolution as proposed by Congress will cause significant fiscal stress for State governments. It will eventually force most States to choose between raising taxes and reducing services.

Second, the effects of devolution will grow steadily over the years. Initially, many States can absorb aid reductions without great difficulty because the aid decrease will be gradually phased in, and many States have substantial budget reserves that will provide a cushion to help them absorb Federal aid cutbacks at first. States will really feel the effect of block grants when one of two things occurs: either a recession or we finally approach 2002 when the aid cuts become much larger.

Third, devolution will have impacts on many State programs besides those directly affected by the reductions in Federal aid.

If one looks at what is happening in terms of State spending recently—and I distributed a table that shows what happened in the early 1990's—there is already severe competition for funding among programs at the State level. If Federal aid cutbacks cause State fiscal stress, the programs that fared badly in the early 1990's would again be losers. Support for higher education and school spending would languish. The fallout would include higher property taxes and substantial tuition increases for college students and their families.

The new federalism approved by Congress last year has three major aspects affecting State governments and local governments:

¹⁶ *Democracy in America*, *supra*, at 674.

First, they would receive less Federal aid than they would have otherwise. Second, there is the change from matching to nonmatching grants for Medicaid, welfare and some other programs. Third, they would get more flexibility.

Aid to States would bear a disproportionate share of the spending reductions needed to balance the budget. Under the most recent proposals, aid would probably fall 15 to 20 percent by 2002. In nominal dollars, the total amount of aid would increase; but, according to projections by the Center on Budget and Policy Priorities, aside from Medicaid there would actually be a decrease in aid provided. So all of the increase is due to Medicaid. Most States could not absorb such an aid reduction without having to cut services or raise taxes and fees. Indeed, many States have long-run structural deficits, even if Federal aid is not reduced.

The second point, which is at least as important as the amount of aid, is its form. Block grants for Medicaid, AFDC, et cetera, would significantly decrease the incentive for States to spend their own money on these programs. Under the system we have had for the past 30 years, States have a strong incentive to spend because of the fact that the Federal Government picks up a big share of the cost, and under block grants they would no longer have that incentive.

Another very important implication of block grants is that Federal aid would not increase automatically during a recession. States usually experience serious fiscal problems when unemployment rises because their tax revenue is depressed and caseloads grow. But those developments in the past have always been partially offset by a large increase in Federal aid.

During the early 1990's, for example, Federal aid rose 34 percent in 2 years, while State tax revenue was only growing 9 percent. This increase in Federal aid made it much easier for States to avoid deficits or painful spending reductions and tax increases. Of course, even with that aid increase, they still had a difficult problem. But, under block grants, they wouldn't get that kind of an increase in Federal aid; and, therefore, their budget problems would be much more severe.

I have a few comments about enhanced flexibility. The freedom that the States would have to redesign programs could pay big dividends, but that depends on how sweeping the legislation creating the block grants turns out to be, and it also depends on the creativity of State governments. Some of the flexibility that State officials seek would help States fiscally but would not necessarily make the programs more efficient.

For example, States would be allowed to withdraw their own funding from the affected programs, to cut off beneficiaries of programs, and to shift costs to others—for example, by repealing the Boren amendment. So those provisions would help the States budgetwise but wouldn't really increase efficiency necessarily.

If the new federalism is adopted as proposed by Congress, the country will be in for a great experiment. In some ways, State governments have improved fundamentally since the 1960's; but if the Federal Government pulls back, there is no precedent for telling how the States would respond, particularly when their incentive to spend on programs like Medicaid and welfare would be signifi-

cantly reduced by the change in the form of the grants from matching grants.

I want to conclude with three questions that ought to be addressed in determining whether block grants accompanied by large Federal spending reductions are appropriate:

First, are the existing programs working well? If they are satisfying the needs they are intended to address at a reasonable cost, then I think there is much less reason to put them into a block grant.

Second, is the primary responsibility for the programs appropriately assigned to the Federal Government or to the States? The Federal Government is much better suited to providing the bulk of funding for programs where spending tends to soar during recessions.

Third, to what extent can increased flexibility be achieved simply by reducing Federal program requirements, without adopting a block grant?

I agree with the other speakers that there is great advantage in allowing more flexibility, and certainly one size does not fit all, but the Federal Government could obtain many of those advantages without going all the way to the block grant approach. Thank you.

Chairman KASICH. Thank you, Dr. Gold.

[The prepared statement of Steven D. Gold follows:]

PREPARED STATEMENT OF STEVEN D. GOLD, SENIOR FELLOW, THE URBAN INSTITUTE

THE POTENTIAL IMPACTS OF DEVOLUTION ON STATE GOVERNMENT PROGRAMS AND FINANCES

I am pleased to speak to you today about devolution and State governments. I recently assumed a position as codirector of the New Federalism Project at the Urban Institute. This new project, with initial sponsorship from the Annie E. Casey Foundation, will monitor and assess the effects of the shift of responsibility from the Federal government to State governments. It will track both State government fiscal adjustments and outcomes reflecting the well-being of children and their families. We look forward to presenting our findings as they develop over the next 3 years, not only to the Congress and other Federal officials but also to State and local officials and the public at large. My comments today, however, reflect my own views rather than those of the Urban Institute or the Annie E. Casey Foundation.

Devolution is a mixed blessing for States. The positive side of the ledger—the increased flexibility in using funds that may accompany block grants—has been widely discussed, although it is impossible to be certain about how States will take advantage of that flexibility. Less attention has been devoted to the potential disadvantages of devolution, most of which are tied to diminished Federal aid. Because there should be full awareness of these possible pitfalls, my testimony will emphasize the possible downside of devolution, the risks it entails and the problems it may cause. I must stress, however, that these negatives have to be balanced against the positive aspects of devolution.

I shall emphasize three points:

- Devolution as proposed by Congress will cause significant fiscal stress for State governments. It will eventually force most States to choose between raising taxes and reducing services.

- Devolution will have impacts on most State programs, including those that are not affected directly by large reductions in Federal aid. For example, both elementary-secondary school aid and higher education funding will be hurt by the intensified competition for State dollars.

- The effects of devolution will grow steadily over the years. Many States will be able to absorb aid reductions initially without great difficulty, but States will really feel the effects of block grants (a) when a recession occurs or (b) as 2002 approaches, whichever comes first.

It is difficult to discuss devolution for several reasons: First, it is inherently complicated, with numerous important effects on States and citizens and major dif-

ferences in how various States will be affected. Second, as the cliché goes, the devil is in the details. Some approaches to reducing Federal aid and increasing State flexibility have very different effects than others. Third, policies like those in the budget reconciliation bill would fundamentally alter the welfare and Medicaid systems, confronting State governments with new choices. There is enormous uncertainty about how they would respond. Fourth, the time horizon matters: the short-run effects of devolution are likely to differ considerably from the long-run effects.

THREE MAIN EFFECTS OF THE NEW FEDERALISM

The new federalism reforms approved last year by Congress have three major aspects affecting State and local governments:

1. They would receive less Federal aid.
2. Some of the most important aid programs would be changed from matching to nonmatching grants.
3. States would have more flexibility in operating programs. What is not known at this time is the size of the aid reductions in relation to the benefits from increased flexibility.

Aid reductions. Aid to States will bear a disproportionate share of the spending reductions needed to balance the budget because the three largest spending categories—Social Security, defense, and interest payments—are expected to be cut relatively little if at all. In the reconciliation bill vetoed by the President in late 1995, aid would have been reduced approximately 26 percent.¹ If there is a budget agreement, the eventual aid reduction will be smaller than 26 percent because the size of the Federal tax reduction will be less than it was in the vetoed bill and more optimistic economic assumptions have reduced the prospective deficit in 2002. But the aid reduction would still be substantial, probably on the order of 15 percent to 20 percent.

This projected reduction is from what aid would have been under past Federal law. In nominal dollars, the total amount of aid would increase. The components of aid should, however, be considered separately. The entire nominal increase between 1995 and 2002 is attributable to Medicaid, which accounted for about 40 percent of total aid in 1995. Excluding Medicaid, aid would fall in nominal dollars. It is also important to recognize that the baseline from which the aid reductions are calculated does not reflect the impact of inflation on discretionary programs in some years.

Federal aid represents between a quarter and a third of State government resources.² A 15–20 percent reduction from what aid would have been in 2002 implies that, other things being equal, total State revenues (including taxes, fees, and Federal aid) will be about 5 percent lower than they would have been in that year. Spreading this reduction over 7 years, we can say that total revenues will grow about 0.7 percent less than they otherwise would have. Whether States can absorb this reduction without having to reduce services or increase revenues depends on how fast current-services spending and revenue are growing. If the growth rate of revenue were at least 0.7 percent higher than the growth rate of spending, States could adjust to the loss of Federal aid without having to cut back spending or raise taxes and fees. However, it appears that most States are not so fortunate. Indeed, many seem to have structural deficits.

This does not imply that States face immediate fiscal catastrophe. For one thing, aid reductions will be gradually phased in. Thus, the effects of aid reductions in squeezing State budgets will probably not be particularly dramatic at first but rather will grow steadily over time.

In addition, many States currently have accumulated substantial reserve balances that can provide a cushion to help them absorb Federal aid cutbacks at first. But those balances represent nonrecurring revenue, and they would disappear fast if a recession occurred.

Some observers may discount long-term projections in the belief that policies could be changed before 2002, resulting in smaller cutbacks. Whether or not that assumption is accurate depends in part on whether a constitutional amendment to require

¹ This estimate was prepared by the Center on Budget and Policy Priorities. For a discussion of this issue developed before the reconciliation bill was vetoed, see Lav and St. George (1996).

² According to the U.S. Census Bureau, Federal aid was approximately 26 percent of State general revenue in 1992. One component of general revenue is miscellaneous revenue, a large portion of which is dedicated to programs that are outside the scope of annual budget deliberations, such as interest received in return for loans to companies (for economic development subsidies) or to homeowners (for mortgage subsidies). Excluding miscellaneous revenue raises the proportion of State resources accounted for by Federal aid.

a balanced Federal budget is adopted. If it were, it would be much more difficult to avoid large aid reductions in the outyears.

Shift from matching to nonmatching grants. At least as important as the amount of grants is their form. By proposing a shift from open-ended matching grants to block grants for Medicaid, Aid to Families with Dependent Children, and some smaller programs, the reforms incorporated in the budget reconciliation act would have significantly decreased the incentive for States to spend their own money on the affected programs. Since 1965, the Federal government has paid from 50 percent to 83 percent of the cost of Medicaid and AFDC, so it cost States only 17 cents to 50 cents to increase their spending for those programs by a dollar. Under block grants, it would cost a dollar for States to spend a dollar.³ Thus, the devolution revolution would reduce not only Federal spending but also State spending as well. It is really a prescription for lower government spending.

The virtual abandonment of open-ended matching grants⁴ is inconsistent with the view that such grants are needed to stimulate the production of services that provide national benefits. It may be appropriate to reduce the high matching rates for some existing programs, but a zero match is too low to produce an efficient level of services for which benefits extend beyond a State's borders. In other words, if a majority of citizens believe that there should be a national safety net that provides a minimal level of certain services, either programs should be funded entirely by the Federal Government or it should provide open-ended matching grants to encourage States to spend more for such services than they otherwise would.

Another important implication of block grants is that the amount of financial aid provided by the Federal Government to States will not automatically increase during a recession. States usually experience serious fiscal problems when the economy contracts because tax revenue is depressed and the caseloads of programs such as Medicaid and welfare grow substantially. During the most recent recession these developments were partially offset by a large increase in Federal aid. Between 1990 and 1992, Federal aid to States rose 34.3 percent while State tax revenue was growing only 9.1 percent, making it much easier for States to avoid deficits or painful spending reductions and tax increases (Gold, 1995). Although some congressional proposals include a contingency fund to augment certain block grants if unemployment rises sharply, States would not enjoy a large increase in Federal aid during the next recession as they have in the past.

The automatic growth of Federal aid caused by the recession of the early 1990's suggests that the full implications of switching to block grants will really not be felt until the next recession occurs. Eliminating open-ended matching grants means that the State budget crunch will be much more severe during a recession than it has been during the downturns of the past several decades.⁵

Enhanced flexibility. An important feature of the new federalism is the freedom it would afford States to redesign programs in more efficient and effective ways. The quantitative magnitude of the benefits from increased flexibility is, however, uncertain. The reduction in paperwork and the advantages gained by consolidating many small programs are probably not worth a great deal in comparison with the loss of funding that is associated with the block grants.⁶

The relaxation of regulations could be more significant, but that depends on how sweeping the legislation creating the block grants turns out to be and the creativity of State governments. Some of the flexibility that State officials seek involves allowing them to cut off beneficiaries of programs or shift costs to others (e.g., by repealing the Boren amendment that has forced States to pay higher rates to hospitals and nursing homes than they otherwise would have). Such provisions help States fiscally but do not necessarily make programs more efficient. But freedom from the voluminous rules governing how programs must be operated could increase efficiency substantially by allowing them to design programs differently.

Historical perspective. The new federalism rolls back the clock, in some ways to the Great Society and in other respects to the New Deal. By fundamentally changing Medicaid, it affects one of the major legacies of the Great Society. By abolishing

³ This is not necessarily true in all cases. Under one Medicaid block grant proposal, there would still be a price effect for low-spending States. That is, they would receive the maximum possible amount of Federal aid only if they spent more than they were already spending.

⁴ With the exception of foster care.

⁵ The corollary of this is that the Federal deficit would not increase as much in future recessions as it would if block grants were not adopted. The tradeoff between larger State deficits and small Federal deficits is not a good one because the Federal Government is better able to finance deficits than States, which are more constrained by the need to maintain balanced budgets.

⁶ That was the conclusion about the block grants created in 1981 according to Peterson, et al (1986).

AFDC, it undoes a guarantee that was established as part of the New Deal. Of course, both of these programs are ripe for reform since they have developed in ways that were not foreseen in 1965 and 1935 and because public attitudes changed. Medicaid has become much more expensive and covers many more people than was expected when it was created; no one predicted that the largest part of it would go for long-term care, or that it would become the dominant form of Federal aid to States. Likewise, AFDC was originally viewed as a program for widows and orphans. It was not until the 1960's that it became an open-ended matching grant, and it was the completely unforeseen explosion in the number of single-parent families that began then that made it so controversial.

But while the new federalism would fundamentally change the form of those programs, it does not come anywhere near returning us to where we used to be in terms of the amount of aid provided. If Federal aid were cut 20 percent from its 1995 level, it would not be any lower than it was in 1992. After falling in the early 1980's and growing relatively slowly through most of the remainder of that decade, the amount of aid began to rise rapidly in 1989. Just 4 years later it had grown from \$124 billion to \$194 billion. Most of this increase occurred automatically, without explicit initiatives from the Bush administration or Congress. As explained above, much of it reflected the recession that led to surging demand for services (including health, income security, and social services). Another part was caused by spending increases related to new Federal mandates. But part also was the result of State actions that shifted costs to the Federal Government, particularly for Medicaid.

De facto devolution. At this time, what once seemed an irresistible march toward block grants and adoption of a balanced budget plan has become less certain. Nevertheless, it appears very likely that much of the devolution agenda will continue to advance.

Two points can be made. First, many States already have waivers permitting them to escape from a large number of the Federal regulations that have governed welfare and Medicaid programs, and the administration appears ready to grant additional waivers liberally. The end of "welfare as we know it" is already occurring, and the same is true for Medicaid.

Second, if momentum toward reducing the Federal budget deficit continues, aid to States will be curtailed, probably resulting in a reduction of the proportion of State revenue coming from the Federal Government. This amounts to *de facto* devolution, although it may occur more gradually than if it were compressed into 7 years.

Thus, whether or not a big budget agreement is reached in 1996 or 1997, the Federal system appears likely to change fundamentally. The issues are how fast it changes and how it changes. It could follow the model proposed by Congress last year, but it would also be possible to reduce the growth of Federal spending substantially without essentially abandoning a national safety net for the poor and leaving States responsible for shouldering the costs of increased Medicaid and welfare caseloads during recessions.

THE CONTEXT OF THE DEVOLUTION REVOLUTION

To project the impact of the new federalism, one must consider the context in which it is occurring. What, then has been happening to State spending and tax policies?

Some important changes occurred in the composition of State spending between 1990 and 1994 (Gold, 1996b):⁷

- Medicaid rose most, growing from 9.1 percent to 12.8 percent of the budget. Among the causes of this increase were health cost inflation, the impact of the recession in raising caseloads, and the shift of other health programs into Medicaid.

- Corrections also rose sharply, from 5.2 percent to 5.9 percent of total spending, reflecting popular support for "get tough on criminals" policies such as "three strikes and you're in."

- School aid, the largest share of the budget, was stable at about 36 percent of the total. This was not a strong performance considering that enrollment rose 6.9 percent during this period. Competition from Medicaid and corrections is probably an important reason why school aid did not increase more. Real spending per pupil, including Federal and local funds, rose only 2.2 percent during this 4-year period

⁷The spending considered here is the sum of general fund spending plus earmarked State spending for elementary-secondary schools. This is a rough approximation of how tax dollars are spent, except that it excludes most highway-related spending. It excludes spending paid for with Federal aid, user charges, or the gimmicks used to help finance Medicaid.

and did not rebound strongly after the recession ended, as it normally did in past periods when the economy was growing.

- Higher education was the big loser in the battle for State support, falling from 14 percent to 12.5 percent of spending. States relied heavily on tuition increases to make up the difference.

- Aid to Families with Dependent Children rose slightly, from 2.5 percent to 2.8 percent. This is not much of an increase in view of the 27.5 percent caseload increase that occurred. Real benefits were reduced in most States.

- The remaining programs received a smaller share of the pie, as States focused on trimming bureaucracies, shifted some health programs into Medicaid, and provided meager increases for other programs.

What would one expect under the new federalism? If Federal aid cutbacks cause State fiscal stress, the programs that fared badly in the early 1990's would again be losers. Support for higher education and miscellaneous programs would languish, and welfare spending would also go down. Corrections spending would surely continue to grow rapidly. School aid would have to battle hard for funds, and Medicaid would rise much more slowly than it did in the early 1990's. There would be intense competition for State funds, and education programs would probably not fare particularly well. Indirect effects would include higher property taxes for local schools and substantial tuition increases for college students and their families.

An important issue to monitor and analyze will be how widely State responses differ. Will many States sharply reduce their spending on poverty-related programs, if given the chance, as might be predicted by those who remember how backward some States were before Federal programs and mandates began to expand in the 1960's? Or have States changed so much that they will maintain most services if they are not required to?

The response of States to devolution depends in part on their tax policies. If States raised taxes to offset part of the loss of Federal aid, services would not have to be reduced as much. Would that happen? As of now, raising taxes is the farthest thing from the minds of most State officials. In view of the political ideologies of many recently elected Governors and legislators, it appears that State tax policy is in the process of becoming more conservative.

But it is not possible to be certain about what kind of tax policies States would pursue under devolution. Raising taxes would be a last resort, and antitax sentiment could waiver if the alternative is significant reductions in services. I suspect that we will see large local tax increases before we see large State tax increases, in part because State aid to localities will be depressed in a period of tight State budgets. Substantial increases in fees and charges, such as college tuition, are also likely.

Not much guidance can be obtained from analyzing recent trends. The major development in State tax policy during the past several years has been small net tax reductions. Last year, for example, approximately 30 States cut taxes, but the reductions amounted to only about 1 percent of total State tax revenue. With a few exceptions, most of the reductions were small or moderate in size. These tax cuts followed a large number of tax increases at the start of the decade. This is precisely what normally has happened for the past 20 years, with increases during recessions and decreases in their aftermath. (Gold, 1996a)

CONCLUSION

If the new federalism is adopted in something like the form proposed by congressional Republicans, the country will be in for a grand experiment. In some important ways, State governments have changed fundamentally. Starting in the 1960's they became more representative, more competent, and much larger. If the Federal Government pulls back sharply, there is no precedent for telling how the States will respond.

The problem of predicting their policies is complicated by some other factors—21 States now have term limits for legislators. While the effects of these newly enacted limitations are still indefinite, they are likely to reduce legislative expertise, increase the short-term orientation of policymaking, and enhance prospects for adoption of new, untested policies. In addition, nearly half of the States have constitutional or statutory spending or revenue limits that did not exist 20 years ago. Since most of those limitations make no allowance for changes in Federal aid, they could present formidable barriers to State efforts to offset reduced reliance on Federal aid.

All block grants are not the same. The result of creating them depends in part on which programs they replace, whether they were entitlement or nonentitlement programs, and whether they were growing rapidly or not.

I will conclude with three questions that ought to be considered in determining whether block grants accompanied by large Federal spending reductions are appropriate:

- Are the existing programs working well? That is, do they satisfy the needs they were intended to address? If they do, the case for devolving responsibility to the States is weaker.

- Is primary responsibility for the programs appropriately assigned to the Federal Government or to the States? The Federal Government is better suited to providing the bulk of the financing for programs where spending tends to soar during recessions. In addition, a strong argument can be made that the Federal Government should play a prominent role in funding poverty-related programs for three reasons: poor States have less fiscal capacity, uniformity of benefits reduces the incentive to migrate from low- to high-benefit States, and the entire society is concerned about alleviating poverty.

- To what extent can increased flexibility be achieved simply by reducing Federal program requirements, without adopting a block grant? In many cases, creation of a block grant is unnecessary to enhance flexibility.

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TABLE 1.—COMPOSITION OF STATE SPENDING, 1990 AND 1994

[Percentage]

	1990	1994
Elementary-secondary education	36.3	36.2
Higher education	14.0	12.5
Aid to Families With Dependent Children	2.5	2.8
Medicaid	9.1	12.8
Corrections	5.2	5.9
Miscellaneous	32.8	29.8

Note.—Spending consists of general fund expenditures plus other expenditures from State revenue for elementary-secondary education.

Source: Steven D. Gold and Sarah Ritchie, "State Spending Patterns Have Been Changing," *State Tax Notes* (January 15, 1996), pp. 187-91.

Chairman KASICH. Let me—first of all, Dr. Lund, I was trying to figure out—first of all, let me ask you, has any central government ever given up its authority that you looked at in your study? You basically say here that all good men, when put in a room, will figure out how to gain control so that—not out of a Hobbesian approach but rather one where, hey, let me get to the plate. I can hit it out of the park better than anybody else can. That is essentially your premise here.

Mr. LUND. Yes.

Chairman KASICH. Has anybody ever gotten all of the power and then given it back?

Mr. LUND. I think so. I don't think it has ever been entirely voluntary.

Chairman KASICH. That is what I am driving at. I mean, is it ever—you see, what is interesting in this town is that the press, to a large degree——

In fact, I was just reading on the way in to work an analysis in the Wall Street Journal yesterday that says the revolution has come to an end because we didn't get through what we wanted. Well, I mean why would—you would have to be really either living in this beltway or really very naive to think that the people who control all the power just would have kind of lackeyed up and said, oh, yeah, we will give it all back to you. It is not surprising, is it, that we have had a veto over the idea of decentralizing power, is it?

Mr. LUND. I think it is not surprising.

Chairman KASICH. Well, where have they ever given the power back, voluntarily?

Mr. LUND. Well, I think there are degrees of voluntariness. I guess I put a rather melancholy spin on this in my remarks, but I would like to try to be a little optimistic and point to the fact that the States gave up some of their power to the Federal Government when we adopted our original Constitution. It seems to me if they could do that then they did it for some good reasons. It seems to me we ought to be able to hope that the Federal Government, presented with sufficiently good reasons, might give some of the power back that it has taken away.

Chairman KASICH. Have we ever seen—but you see the people who are giving up the power were the ones that were sitting in a room who got more power by taking it out of the hands of the State. I mean, if you were a delegate, you were involved—that just says what you said in here, that noble men will always try to accumulate more power because they took it—if I was from Pennsylvania, I got it out of the hands of those idiots over there in Maryland, so that I had more authority, right?

Mr. LUND. That is right, but the Constitution——

Chairman KASICH. So what I am asking is—you don't have to be melancholy, upbeat, or whatever. Just be factual or give us your opinion. Where has a central government voluntarily ever devolved itself of power and authority and money? Ever?

Mr. LUND. In a significant way, I can't really say that I know of any examples.

Chairman KASICH. So this would be a second great American revolution if the Federal Government was to give up a lot of its power, is that correct, voluntarily?

Mr. LUND. I think it would be an event of the same scale that the event that led to the adoption of our original Constitution, yes.

Chairman KASICH. Well, how would you suggest we get that power out of the hands of the Federal Government?

Now, Mr. Gold—and I will go to him in a second—is basically saying, we will give you more flexibility; and, of course we will. You see, they are in a real weak position now because they are essentially defending a one-size-fits-all philosophy, and Americans increasingly believe that the Federal Government has served a very useful purpose for a long time, but it ain't working any more.

If you look at the welfare system, which has encouraged—you know, you can have this ongoing debate—but, in my judgment, has encouraged more illegitimacy, more erosion of fundamental values. They can't defend that system any more; but they say, well, we will give you some flexibility; and that is a code word for keeping control in another way.

How would you suggest we seize this power back? Because you point to a court case in here, and you must do some politics, because I say it is nothing but academic, and you are right.

Mr. LUND. Maybe. It may turn out to be nothing but academic.

Chairman KASICH. How would you suggest that we proceed to get our power back to where we live?

Mr. LUND. I think the likeliest road to a major change would be either a constitutional convention or such a realistic threat of a constitutional convention that Congress tried to head it off by making reforms on its own. I think that is the likeliest path.

Chairman KASICH. How about a depression?

Mr. LUND. That might—that might do it if it were severe enough. I am not sure about that, though. I think a depression might—

Chairman KASICH. It might go the other way.

Mr. LUND [continuing]. Might stimulate calls for even more Federal intervention in the economy. That is certainly what happened the last time.

Chairman KASICH. Let me ask you, Dr. Gold, if this idea—and I listened to it and I respect it, because it is all about the love of people, frankly, that drives this debate. Those who want to maintain central government believe that if we don't, innocent people will get hurt. I respect that. That is why I think we have done a lot of wonderful things in this country over the last 40 years, because the goal was to lift the individual above the obstacles that kept them from being successful.

But my philosophy is—about life—is that everything is a pendulum, and we have essentially assumed too much power and control. Let me ask you the question about why is it that there is this fear on the part of people who are advocates of a powerful central government that people in the State of Ohio—where are you from?

Mr. GOLD. I just moved here from New York. Before that, I lived in Colorado and Iowa.

Chairman KASICH. OK. Let's forget New York. Let's go—well, that is a weird place, so let's just go to Iowa. Why do we think that people in Iowa would not design a system of helping people better than the Federal Government? Many of the bureaucrats know nothing about Iowa. What leads you to conclude that people out there just don't get it here in the 21st century?

Mr. GOLD. Well, in fact, Iowa is one of the States that has been most creative in redesigning its social services and reinventing the system. But I think that one of the main points is that the Federal Government provides incentives. Now, as you—in your question, you alluded to the incentives that the welfare system provides for people to do things that we don't like. Well, in the same way, the way the Federal Government provides aid to State and local governments, provides incentives; and the system we have had for the past 30 years provided these grants which provided a powerful incentive for States to spend.

In some States, it only costs 20 cents to spend \$1. In other States, it would cost 50 cents to spend \$1. So that is like putting services on sale, and States responded to that by increasing their Medicaid spending and increasing their welfare spending—or at least not cutting it back. Now, if you abolish that system and say it is going to cost \$1 to spend \$1, then many States are going to probably cut back their spending; and certainly it is going to look different to them if they have to pay the whole cost.

Now, if there is a program where the matching rate is very high, then sometimes you might get the States to go overboard in spending on that program. So it might make sense in some cases to reduce the matching rate from where it is. But to completely eliminate it, to go to zero, which is what block grants do, that means that many States would either cut back or not increase very much and therefore decrease over time, due to inflation, what they are spending on those programs.

Chairman KASICH. Well, why then do the Governors say that if you just give me the money, let me keep my money without all the rules and let me design it, we can actually serve more people?

Mr. GOLD. I think that that is a good question. I think that the Governors are right in the short run, and I think many Governors look at what is going to happen during their term in office.

As I said, in the short run, the States can absorb the kind of proposals that Congress passed last year. But if we went all the way to balancing the budget in the year 2002, then it would be much more difficult for the States, but that is beyond the time horizon of many Governors.

Also, around here in Washington it seems people aren't thinking much about what would happen when there is a recession, and I think the Governors are not either. We have had a fairly steady economic growth—2, 3, 4 percent for several years—and so people are not—don't have their mindset into what will happen when there is a recession. So I think there are problems that the Governors have not—

Chairman KASICH. So you presume they don't really understand what is going on out there in their own States? Is the presumption?

Mr. GOLD. No, they do understand what is going on.

Chairman KASICH. They haven't thought about recession. I mean, you essentially question whether they understand it. They don't really get it, in your mind? They just don't get it?

Mr. GOLD. They get it, but their mindset is on the short run; and they recognize the—

Chairman KASICH. So then they don't get it.

Mr. GOLD. They recognize the absurdities of the system that you talked about in your introduction.

Chairman KASICH. No, no, no. I don't mean to be argumentative, but I just want you to understand the question that I am trying to ask you.

You presume that the Governors have either not thought about the long term, have not considered recession session; and they are telling me, give me the program because I can serve more people better. You are saying, basically, they are wrong.

Mr. GOLD. I am saying that in a way you could say that they are dazzled by the flexibility. You were talking before about wanting

to have more power. Well, this would give them more power in the short run, and it would free their hands to be much more creative, and I think they are putting great emphasis on that, and they are not thinking long term enough about what the effect would be down the road.

There are real gains in the short run; but I think that, down the road—many politicians tend to emphasize the short run, and they don't pay enough attention to what the long run will be 5 or 7 years from now.

Chairman KASICH. And your view would be that bureaucrats who were not elected would basically take a look at the long run more effectively than those that live in Washington?

Mr. GOLD. No. I think we have to worry about bureaucrats—I think Congress needs to try to set up a system that is balanced, that tries to create as much flexibility while preserving some incentives to do the things that people believe need to be done.

Chairman KASICH. Right. What we are saying is they can't do that at home because they are either—what is it about them that prevents them from designing this model inside their boundaries rather than designing it here?

Mr. GOLD. Well, when there is a recession in a way the Federal Government is better able to deal with a recession than the States are. The States have a much more limited ability to borrow than the Federal Government, and—

Chairman KASICH. Well, that is for sure. We are \$5 trillion in the hole, so we are good at borrowing.

Mr. GOLD. So, therefore, what you are really doing by your proposals is shifting the burden, a significant part of the burden, in a recession from the Federal Government to the States; and the States don't have, because of—as you—for the reason you just mentioned, don't have the ability to deal with the costs of a recession as well as the Federal Government does.

Chairman KASICH. Well, let me just then—this is so—I would like to get you in my office and talk about this.

Then what you think is that we are really good at borrowing. So what happens to the children that have to pay the bills, the IOU's on Social Security? What are we going to do to them?

Larry Kotlikoff, I don't know if you know him, but he says the kids are going to be burdened with 84 cents. So we are really good at borrowing, but isn't that short-term thinking, borrowing, keeping more burden on the future?

Mr. GOLD. I am not objecting to reducing the deficit. We do need to reduce the deficit. But in designing a deficit reduction plan you have to try to recognize the incentives you are providing; and you have to consider, as you know, a multitude of factors; and there are probably other ways of doing it that would minimize some of the problems that are created by the plan that was in the reconciliation bill.

Chairman KASICH. Mr. Sabo.

Mr. SABO. Maybe some random comments, some questions.

I have—frankly, I would say that the one trend that I have seen over recent years that concerns me the most as it relates to the role of the Federal Government is the incredible centralization of the Criminal Code—generally, a drive led by conservatives but some-

times by liberals. What we have added to the Federal Criminal Code in recent years is incredible.

The expansion of power we have given to the Department of Justice in recent years is incredible, and it has gone on with very little notice. I come from a State where we call our State law enforcement the highway patrol, not State police. This reflects a strong belief in local law enforcement. We believe the State and Federal Government are there to supplement it, not to dominate it.

But what has been going on in recent years generally—usually in a crime bill passed shortly before the election so we can say that we have been tough on crime—is an incredible centralization of the Criminal Code in this country. For any of you who are theoreticians in this area, I would suggest you look at it.

When you get to the other questions—I say as someone who has spent a long time in State government—the belief that somehow we are in a system where one size fits all today doesn't begin to reflect the diversity of State and local government in this country. It is incredibly diverse. We are probably very different from most of the democracies of Western Europe in the amount of decentralization that exists in our system in comparison to all other representative democracies. The question is how we continue that and how do we make that effective while still dealing with legitimate national problems.

As far back as 20 years ago in Minnesota we tried to do in effect what Senators Kennedy and Kassebaum are trying to do with health care in terms of requiring continuation of coverage. We were frustrated by the Federal ERISA law, now in this session of so-called devolution, I discovered that a bill is moving to increase the scope of ERISA and further limit the ability of States to deal with health care.

I listened to some of the discussion on welfare. One of the amazing things I think you will discover is that if you look at the States who have the largest Federal share of Medicare or Medicaid or welfare, they also have the lowest benefits. We have developed in welfare a strange theory of cause and effect with no substantiation.

The reality is that, nationwide, the funding of AFDC—to the degree that is considered welfare—in the last 20 years decreased substantially in terms of real income support. I think the reality is our current welfare system doesn't respond to what has happened to the American family in many ways today and clearly needs reform. That has been on the agenda for a long time.

As a legislator 20 years ago, I came here regularly representing State and local government, trying to develop a system for welfare reform. What has happened in society has not been caused by welfare. The welfare system isn't able to respond, I think, to dynamics that have changed in our economy. But the relative income support that we give people today is substantially less. From all the rhetoric, one would think it has expanded and grown immensely over the last 20 years when the trend is exactly the reverse.

If you go back 30 years, there are two things that have really expanded in terms of the Federal budget and revenues. Federal revenues stay under 20 percent of GNP, never exceeded it, normally 19 percent, between 19, 20, sometimes dipping below 19. But if you go back over 30 years what has grown is the payroll tax to pay for

Medicare and Social Security. The revenues for other purposes have decreased, decreased substantially in terms of historic Federal revenue-raising, but they have grown for those two very specific purposes.

I am not sure there is anyone who would suggest that having a minimum uniform retirement system such as Social Security was not a wise thing to do or that having a national system of health care for the elderly as we have in Medicare was not wise. We can quarrel over how we should reform it, and we have to slow down its growth, but I don't know that anyone would say we should abolish that system. Maybe there are a few people. Maybe some of the panelists here would want to abolish it.

But the reality is that paying for that is where Federal revenue growth has occurred and the balance of Federal revenue has decreased. When we extend the discussion to how one deals with the issue of low-income people in this country, it is a little different than Medicare. Medicare is 100 percent federally funded while low-income programs have some State and often local funding. Still we need to have some interest and some uniformity.

I look at proposals by the Governors, and they would allow the States to take massive amounts of money out of that system. The political pressures are there. You know, poor folks are not the most powerful here. They are not the most powerful in State government. There is incredible pressure to pull that money out. There is concern over how you have some similarities between the States. You put the States in a real bind who want to do the right thing, Mr. Chairman.

I just had lunch recently with a friend who just moved to Minnesota from a neighboring State. He came for one reason: his daughter is severely mentally retarded. The advice he got from the neighboring State was get out, move to Minnesota. So they come. Except for that pressure, he probably wouldn't have moved.

We know that there are people—we talk about welfare as being the poorest, but we know when it comes to disability, where those kids are doesn't follow income standards. We know that people who are transferred from multistate, interstate companies, if they end up in our State they don't accept transfers out. They take transfers in because of these benefits—and those variation of benefits exist among States today because of choice.

But putting all of the pressures in the system for Governors to pull money out—and the amount is massive in some States—it is just inevitable that the pressure is going to be on there in times of fiscal distress to substantially cut those programs. Some States may resist for a period of time, and then the pressure builds and you will have substantially decreasing quality of benefits throughout this country.

A different issue is how you deal with flexibility. We do things differently in Minnesota than other States do. We think we run them efficiently. Additional flexibility, I have no problem with. But there is some Federal role in saying there is some system for millions of Americans to deal with health care. That we expect some type of standards when we raise money at the Federal level to support a health care system. Also we expect some contribution from the States, depending on their capacity; even if we can't measure

it very well. That clearly is something that is of concern to the Federal Government.

I have to say, when we come to the environment, again, you run into the same issues. Air doesn't follow State borders. Water doesn't follow State borders. You know, I would love to have a system where somehow in Minnesota we could simply run a sewer line to the Iowa border and dump it in the Mississippi. That doesn't make much sense. What happens in the Mississippi in Minnesota affects people all the way down the river.

The reality is what happens with air pollution in Canada affects a significant part of our State, what happens in Wisconsin and Michigan affects our State. In some cases we have similar types of industry. There is concern, if you have tough local standards, that it could affect where business moves.

So I find clearly one needs national standards. How you implement them is always subject to question. But this sort of dogmatic language of tyranny and all of this I find contributes very little to the answer of what are some very difficult questions. I think pragmatic ones, not ideological, of how we deal with legitimate Federal interests in a service delivery system that many times we delegate to States, or even to counties.

I have to say to our friend from Virginia, I was amazed when I came to Congress and discovered Virginia was an area that elected its own school board and the county board set the school budget for the county or the county board set the school budget for schools. Frankly, there may be some merit to it; but that is a very different system than I was ever aware of.

That kind of diversity exists in an incredible way in this country, so let's not downgrade it. The question is how we deal with effective national interests within the diverse system of State and local governments in this country.

Chairman KASICH. Could I just briefly—and then we will go to Mr. Kolbe.

You know, a lot of what you say, Martin, is—obviously, truth rings in it. I will tell you that I saw an amazing study—and I don't think it came out of some right-wing institution—that indicated that in three or four States, beginning computer operators were actually making less, the bottom line income, than welfare recipients.

Mr. SABO. Well, I think what we do with the basic wage of people that work in this country today is atrocious. You look at what it requires people to live today, and the reality is that the bulk of folks aren't making a decent wage to live on.

Chairman KASICH. Exactly.

Mr. SABO. They aren't getting health benefits, they aren't getting pension benefits. We are going through corporate downsizing, often simply to get rid of the lower-level jobs.

Chairman KASICH. But you see, over the last 30 years—not in the last 30 years, in the last two decades, we have had a significant decline in the national savings rate.

Mr. SABO. Yes.

Chairman KASICH. And the national savings rate, I am not talking about individual savings, the national savings rate has eroded our productivity and, thus, the value of our jobs and our wages,

which has been caused fundamentally by where we allocate resources at the Federal level by the government.

Let me further say, though, the point about the welfare is, if people were allowed to keep more of their money, those beginning computer operators would make more than the welfare recipients.

But that is not even the issue. The issue—

Mr. SABO. But let me speak very specifically. The explosion—and we can quarrel over what has happened over the last 15 years. The explosion of the deficit started in 1981.

Chairman KASICH. I don't—it is not just the deficit.

Mr. SABO. There are lots of us who said at that point, we do this and the deficit is going to explode. It did. But there are other things that contributed to it: the explosion of health care costs that was not dealt with through the 1980's—

Chairman KASICH. I agree with that, which we are trying to do now; and we have suffered demagoguery as a result of it maybe.

Mr. SABO. Let me say there was lots of demagoguery in the 1980's. There were certain things in place, maybe not working perfectly. In the late 1970's, we began the process of health care planning in this country. All of that was repealed in the early 1980's. I frankly think one of the reasons I represent an area with lower-than-average health care costs with significant quality is that the health care planning process worked seriously. Both public officials who were involved with it and other people involved in the health care sector worked on it and you saw significant consolidation.

Planning was a bad word in the early 1980's, so all of those provisions didn't get reformed, they got repealed. Escalation in the health care costs just exploded and no one paid any attention to it.

Chairman KASICH. Well, that is not—

Ms. WOOLSEY. Would the gentleman yield?

Mr. SABO. I would love to.

Chairman KASICH. Let me tell you, Martin, that first of all I would commend two books to you. One by a guy named Ben Wattenberg, who is a Democrat who wrote a book called "Values Matter Most," where he pinpoints much of the stuff in the welfare system as encouraging, increasing dependency. When you look at the numbers, they are staggering.

Secondly, there is a book by a guy named Marvin Olasky, and you and I approached this; our goals are exactly the same, our approaches to them are different.

But you know, up until the Roosevelt years, the great givers of charity and providers of compassion in our country did not want government involved, because they believed that bad charity growth drove out good charity. I am not talking about a system here in the 21st century that would—that would eliminate welfare; I think we need to think about systems that transcend welfare, and those are systems that frankly we are not even able to play with if we can't make the first step of beginning to have some laboratories out there.

Mr. SABO. Mr. Chairman, those laboratories exist, and we tend to ignore them when we come to revise a program. You know, I would suggest that in Minnesota there is a significant program—

Ms. WOOLSEY. Would the gentleman yield?

Mr. SABO [continuing]. Of family support trying to revise the AFDC that appears to be working. It goes contrary to everything that is being mandated out here.

Chairman KASICH. The question is whether you have to come to Washington and ask people for waivers to design your own program to take your welfare. My philosophy is, you shouldn't. Yours is that you should. It is a different philosophy, and that is OK. That is OK. But either of our models right now aren't going to fix this problem. A government-run model ain't going to fix it. It is getting worse, not better.

Mr. SMITH OF MICHIGAN. Are you folks listening?

Ms. WOOLSEY. Would the gentleman yield for just a minute?

Mr. SABO. I would just suggest that for the last word here, that in the nature of modern society, taking the story of the Good Samaritan literally is maybe not how we ultimately deal with the whole host of real social problems.

Chairman KASICH. That is the debate. I give you the last word.

Mr. Kolbe is recognized.

Mr. KOLBE. Thank you, Mr. Chairman.

Chairman KASICH. It was interesting.

Mr. KOLBE. It was a very interesting philosophical debate, but we do have three panelists out there, and I do want to get back to our panelists if I might.

Unfunded Federal mandate, let me just preface what I am going to say by noting that I basically agree with the comments that I heard about the need to reassess our Federal system. Some of my questions are being asked in the true—hopefully in the Socratic method here.

Unfunded Federal mandate: Ms. Dunlop, do you object to “unfunded” or do you object to “mandate”?

Ms. DUNLOP. Well, frankly, we in Virginia object to both, but we recognize that the Congress of the United States has to start somewhere, so we prefer to start with unfunded Federal mandates and try to end those.

Mr. KOLBE. So you mean, if we just fund them, it is OK?

Ms. DUNLOP. No, no, absolutely not. Although funded mandates are preferable to unfunded mandates, we in Virginia believe that the 10th amendment should be reasserted by both the Members of the Congress as well as by the States, in toto. We would prefer to have more of the responsibility and authority vested in the States, as the Founders envisioned.

Mr. KOLBE. But that would imply also then that we would leave the funding to you, or we wouldn't be providing the funding either?

Ms. DUNLOP. Well, I understand that. We in Virginia understand that. We recognize that there are going to be—there is going to be a challenge for all of us in this country to change the way we have done business for the last 60 years, and that is to—what we are doing in Virginia now is evaluating our programs, evaluating our rules and regulations, determining what is an appropriate role for government. We recognize that there are going to be instances where we believe that there is not an appropriate Federal role, but there is an appropriate State role; and that may indeed require us at the State level to come up with the funding, whether it is shifting it from other programs or looking for new sources.

Mr. KOLBE. Well, let's say for a second that somehow we were able to actually accomplish this—and I hope that in my lifetime it will be possible—and going along with that, it would be necessary, of course, for Congress to reduce its share of the tax as a percent of the GDP. You would agree with that?

Ms. DUNLOP. Yes.

Mr. KOLBE. We have to reduce the taxation burden. We can't reduce it altogether, because we have responsibilities as a Federal Government and there is unfortunately a debt service problem that is going to be with us for many lifetimes.

But let's say we reduce the Federal GDP, percent of GDP that the Federal Government takes from—roughly 21 percent that it takes today to save 14 percent. Do you think the States are going to be prepared to raise taxes to pick up those responsibilities that we devolve back to the States?

Ms. DUNLOP. Well, sir, let me say that our philosophy, Governor Allen's philosophy and his team's philosophy, we strongly believe if you begin reducing taxes on the individuals and on the companies in this country, we will have an explosion of economic growth. When you have economic growth, you both have more money in the hands of those who earn it and you have more tax dollars that just generally—that will come into the system as a result of economic growth. So we believe that there will be appropriate avenues to fund the necessary programs that States and local governments should be involved in.

Mr. KOLBE. Let me just ask, I already had a yellow light on here. It seems to me that some of my green time went to the others over there.

Let me just end with asking one question to any of you or all of you there. Mr. Sabo referred to it, and that was the issue of—this is just one area that we could talk about, but it is one that I think is particularly troubling, because I think most of us recognize it doesn't neatly fit into State lines, even national lines, and that is environmental questions.

To what extent does the Federal Government have any role in the environment, whether we are looking at such things as the biodiversity with species protection, whether we are looking at aquifer protection, rivers, the flow between States, all of those kinds of issues; not to mention the huge, global issues that we may not have enough—we probably don't have sufficient scientific data to really assess at this point, like global warming. But the others, many of the others we do have sufficient data to know that there are significant environmental problems.

To what extent should this be left entirely to States, and to what extent should the Federal Government play a role in this? I would like to ask all of you to comment on that briefly.

Ms. DUNLOP. Obviously there is a great debate that is going on with respect to environmental issues right now, and there are people who come from a lot of different perspectives. We in Virginia believe that there is an appropriate Federal role. We believe that the fact of the matter is, when the Congress of the United States identifies an environmental challenge such as, let's say, clean air or clean water, that it is appropriate to have debates and discussions here on Capitol Hill and to make determinations about what

guidelines might be appropriate for the health and safety of our people and the environment at the Federal level. We think that the role of an agency of the Federal Government could be to pull together the appropriate scientific research that has been done.

As you well know, and I am sure everyone on the committee knows, scientists can disagree, but I think it is important that we base environmental decisions on sound science and that people who are making those decisions and establishing those guidelines by law should at least have the benefit of hearing all sides of the scientific debate before the people who get paid the big bucks make laws that govern the lives of our citizens.

I would say, furthermore, that we think that the principle of "polluter pays" is certainly one that is appropriate in this area of environmental law and regulation, and to the extent that—let's just look at water quality for a moment.

Mr. Sabo talked about dumping sewage from his State into Iowa, and would that be appropriate or not appropriate. Well, when the people of Minnesota make a decision to dump sewage into Iowa, we believe that people from Iowa have a right, under our judicial system, to sue, and that threatening such suits and having the principle of "polluter pays" in fact used in our country would actually be a preventive mechanism that would encourage people to do what is right and responsible.

In Virginia, we are talking every day about environmental stewardship; we are reasserting the involvement of localities and citizen groups and the responsibility for maintaining and approving the quality and condition of our environment; and we believe that Governors—I mean, I must say I was shocked earlier to hear the integrity of Governors and their motives questioned here in this committee room, but we believe that Governors and members of the State legislatures do have not only the short-term interests of the people of their various States, but also their environment at heart, and want to work to improve those and are looking for creative and responsible ways to do that.

Mr. KOLBE. Thank you. Would either of the other two of you care to comment on that question about the environmental and the Federal role?

Mr. GOLD. There is a general concept that applies not only to the environment, but to human service programs, and that is, there are spillovers from one State to another. Now, in the environment, as Representative Sabo said, sometimes there are spillovers, and when there are spillovers, it makes sense for the Federal Government to be involved.

Secretary Dunlop said that people can use the courts, but the courts are already overloaded, and if we left it completely up to people suing, then the courts would be—we would have to expand the courts, you know, several-fold. So sometimes, by legislating, Congress can reduce the burden on the courts by clarifying certain issues.

But the same principle also applies in human service programs. If you have people moving from one State to another, then that is another factor you have to consider in your programs, because Representative Sabo mentioned that some people moved to Minnesota because of the good services they have. In designing the Federal

system, you have to be concerned about that, and with welfare reform, we might have welfare magnets.

So there definitely is a Federal role, but I wish Representative Kasich was here to hear me say that I think he is right that, in a sense, sometimes the Federal Government goes too far in saying that one size fits all. When you have a mandate, it really says, one size fits all; and if we want government to be more efficient, so as to be less of a burden on the economy, there are certain mandates we need to reexamine, because we can still have a Federal role and have the Federal Government influence what happens without having flat mandates apply equally to every State.

Mr. KOLBE. Thank you.

Mr. LUND. I would only just add, very briefly, I agree with much of what Secretary Dunlop said.

I would draw a distinction, though, between the kind of exporting of pollution that Mr. Sabo talked about, dumping Minnesota garbage in the Mississippi River and air pollution which obviously crosses borders, I would draw a distinction between that; and that is the kind of unhealthy competition between the States that I think the Federal Government has a proper role in addressing, and healthy competition between the States, which may occur with subjects such as welfare.

Mr. KOLBE. Thank you.

Mr. HOBSON [presiding]. Mr. Orton.

Mr. ORTON. Thank you, Mr. Chairman.

Mr. Gold, you just gave the answer to the question I was preparing to ask. It has been pointed out that air and water do not stop at the border, and neither do people. In fact, when you have an economic recession, when you have regional problems, unemployment and poverty, or even regional problems with weather, like huge floods, you have dislocation and an economic impact as a result of it that crosses over State borders as well.

The question is, is there a Federal role? It appears some on the panel believe there is a Federal role with environmental issues, but that Federal role is through Federal courts, rather than the legislative branch. Let me start out by saying that no one believes that the Federal programs of Medicaid, welfare, and others are operating perfectly. In fact, the coalition budget, which I helped to put together, along with Mr. Sabo and others in the Democratic Party, clearly recognizes that there are efficiencies to be achieved by allowing greater State flexibility. The concern that many of us have is if you simply abandon Federal participation, if you do not have Federal standards, Federal goals, if you do not have a format within which States agree to work; if you simply say we will dispose of the Federal role and we will shift over to the States with a block grant so that the States can have total discretion as to how to use funds, that raises the question of unhealthy competition between the States in areas like welfare.

Suppose that a State, say Idaho, which borders my State, decided to hold a referendum and in that referendum they decided they weren't going to spend any State tax dollars on welfare and Medicaid, food stamps, nutritional programs, job training assistance, et cetera. They just decided they are not going to spend it, they are not going to have a Federal or a State program to do that. Also as-

sume that the State of Utah continues to have a program to do these activities.

People don't stop at the borders of a State. I think that is what Mr. Madison was talking about in the Federalist Papers 220 years ago, when he said that the very proximity of the States creates natural enemies in some of these kinds of issues. So you may develop unhealthy competitions. I think that is what some of us are worried about.

Now, the coalition budget shows that you can change these programs to give more responsibility, more discretion, more flexibility among the States without actually eliminating the Federal role and the participation and cooperation among the States in these standards. So let me just ask the panel two or three example questions of what might occur under a pure medigrant program under Medicaid—an area that we have been talking about changing in the budget.

As we allow States much discretion in defining eligibility, would it not be possible that one State—for example, a State adjacent to my State—might decide to use Medicaid block grant funds as an economic inducement to get a company currently located in Utah to move to their adjacent State, just as they now use tax incentives to lure companies across borders? Couldn't they use these Medicaid funds to offer to pay for the health care of all income-eligible workers, so that the company, as a financial inducement, may then move into their State?

Secondly, as we relax mandatory coverage of certain classes of benefits, couldn't the States shift benefits from low-income individuals to middle-income individuals? It certainly would be a popular move among middle-income taxpayers. Or urban versus rural, in States where legislatures are dominated by urban areas, couldn't these programs benefit urban populations to the detriment of rural benefits?

If we don't have some meeting among the States and some cooperation through the Federal Government as the facilitator, aren't those kinds of discrepancies possible among the States?

Mr. HOBSON. I might suggest you make your responses brief, because the red light has been on for some time.

Mr. GOLD. Briefly, it depends on the kinds of restrictions that you put on the use of the money. If you have very loose restrictions, then there could be.

Mr. ORTON. What about the proposal that passed in the Congress?

Mr. GOLD. I am not familiar enough with it to answer that question.

I would like to say, though, that to correct Secretary Dunlop, I didn't in any way impugn the integrity or the motives of the Governors. What I said was that Governors—that States respond to incentives, and they do have great integrity and they have good motives, but that still could be—it still could be undesirable to the system, the Federal system to give them power in areas where the Federal Government really ought to be laying down ground rules.

Ms. DUNLOP. Yes, sir. Let me just say that, first of all, I think there is certainly plenty of opportunity for us to find examples of misuse of tax dollars at the Federal level and probably at State lev-

els and perhaps even at local levels. That is something we always have to guard against in a free society. But I think that it is the rule that we want to establish rather than the—than to highlight the exceptions. We always need to be careful and mindful that there are going to be exceptions, and be vigilant to try and correct those when those excesses come.

In Virginia, for instance, Governor Allen has established a very firm policy that tax dollars will be used for the purpose for which they were collected. Our general assembly has generally agreed with that, although under past Governors, it is true that tax dollars that were collected for a specific purpose were then taken into the general fund and applied to some other program. We have spent some time correcting that.

So I think that those problems might exist, those exceptions might exist, but I think as a rule, people recognize that when taxes are collected for a specific purpose, it is wrong, immoral, to use them for different purposes; and I think that that would be something that would guide the States, as I am sure it guides most of the people in the Federal Government.

As far as there being competition between different individuals or different parts of States, that does exist. It certainly exists in Virginia. We have the northern Virginia constituency that is always battling for more highway money versus the rural areas of Virginia. But what we have found over the course of time is that when people come to the Commonwealth's capital, people who were elected, that these issues get resolved and get balanced out, perhaps not in the same session of the general assembly, but over a period of time because, by and large, the people who are elected, once they come together and work as a body in our general assembly care deeply about the development and the benefits for our entire State.

I think that we are concerned, obviously, that we would like to have greater authority over these programs in Virginia, not so people can misuse tax dollars or misapply program moneys, but because we believe in Virginia that we, as Virginians, can best determine how to serve and meet the needs of our citizens so that everyone in Virginia can have a better quality of life and a higher standard of living, better jobs, more of their disposable income in their own pockets.

As for your specific request, I am not familiar with Virginia's position, but I would be happy to get that to you, on your proposal.

[The information referred to follows:]

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE GOVERNOR,
Richmond, VA, March 25, 1996.

Hon. JOHN KASICH,
U.S. House of Representatives, Washington, DC.

DEAR CONGRESSMAN KASICH: When Virginia Secretary of Natural Resources Becky Norton Dunlop testified on federalism to the House Budget Committee on March 5, 1996, Representative William Orton asked her to look into whether or not Virginia had taken a position on the alternative budget offered last fall by some Democrats.

She has since learned that Virginia did not take a position on the alternative budget or comment on any aspect of it. Virginia has, however, supported efforts by House Republicans to reform Medicaid.

Sincerely,

GEORGE E. LEE,
Special Assistant.

Mr. HOBSON. I would like to say, when I was in the State government, I wrote the disproportionate share for our State and we grabbed every incentive we could, and it damn near broke us.

Mr. SABO. How badly did you rip us off?

Mr. HOBSON. We did pretty good.

Mr. SABO. A lot of Governors want to return to that system who didn't do as well as Louisiana and New Hampshire.

Mr. HOBSON. They came after we did that. We did ours too early.

Mr. SHADEGG. Thank you, Mr. Chairman. I would like to start with Secretary Dunlop.

As I understood the import of Mr. Orton's question, it really was, could there be an abuse of Federal dollars under such a system. But if I understood your testimony in response to Mr. Kolbe, it was that the ideal is that that these not be Federal dollars and that, rather, we return not only the authority for these programs, but also the obligation to fund them to the States; is that correct?

Ms. DUNLOP. Yes. I believe that the 10th amendment is quite clear in its pronouncement about what the enumerated powers for the Federal Government should be. I believe those are appropriately funded by tax dollars that are collected by the Federal Government for those purposes.

It is going to be a long haul for us to shift all of the programs that have come to the Federal Government from State and localities back to States and localities, but that is where they should appropriately be determined and appropriately funded.

Mr. SHADEGG. Thank you.

With regard to the process of shifting them back, I notice that at page 8 of your testimony, you make reference to a measure which could be introduced. You refer to it as a simple statute called the Federalism Act, which would require Congress to identify the constitutional sources of its authority when passing legislation.

I happen to have introduced that very bill; it is called H.R. 2270. It requires every piece of Federal legislation to recite the constitutional authority from which it derives and on which it is based.

I guess I would like to ask you, first of all, if you believe you could get the Governor to embrace this idea, and perhaps whether or not you could get the Governors' Association to embrace it; and then I would like to ask you some specific questions about where we might go with that legislation.

Ms. DUNLOP. Well, Representative Shadegg, I will get a copy of that bill from you before I leave today and take it to my Governor. I am sure he will be intrigued to know that you have introduced this in the House and will want to take a close look at it.

I would also draw your attention to the other two ideas that we included in the testimony: the idea of a State's veto and a State's initiative, which would be supermajorities of States being allowed to initiate constitutional amendments and also supermajorities of States allowed to end or stop or overturn laws, Federal laws and regulations, which we would like to talk to you about at some time.

Mr. SHADEGG. Let me—with regard to the issue of the State's veto, let me talk to you about two issues which are not in this particular version of the bill, but which we have contemplated. One would be that there would be following—in the course of the debate of any act, not only would you have to recite the constitutional source or authority for the Federal Government to legislate in that area, but we have thought about two other ideas. One would be a requirement that you would then debate that issue on the floor and then have a separate vote on whether or not the Congress had that authority, make me accountable for my interpretation of the 10th amendment and the balance of the Constitution, so that I could be reviewed on that.

But second, as you know, many States—my State, for example, has the referendum process whereby no law enacted in Arizona, other than emergency measures, goes into effect for a period of 90 days after its enactment. During that time period, the legislation—the citizens are entitled to take out what they call a referendum petition, and if they believe the measure should not go to law, to refer it to the ballot.

We have contemplated—and speaking of legislative veto, I would like to get your reaction and perhaps the Governor's reaction—additional language to this which would say, no Federal act would go into effect for a period of 90 days other than emergency measures after their enactment and that during that time period any State could bring original jurisdiction action in the U.S. Supreme Court challenging the measure on 10th amendment grounds, saying the Congress enacted this, it recited this clause of the Constitution, we the State of—the Commonwealth of Virginia simply believe they are wrong and take that issue directly to the Supreme Court.

Ms. DUNLOP. Well, that also is a very intriguing idea.

Governor Allen did establish a self-determination and federalism advisory committee, and we have looked upon some of these ideas as ways to reassert States' rights and States' authorities according to the 10th amendment. So I will be happy to discuss those. We would like to work with you on those kinds of ideas.

Frankly, we believe that people who are elected to the Congress of the United States are of the caliber that such appropriate debate should occur, and with C-SPAN now, where the entire electorate of our country can watch and listen and understand really these discussions, and also recognize to a greater extent the authority and responsibility that does reside in State governments and local governments, and some of these debates on whether or not programs should in fact be government programs are appropriate.

So we are for encouraging the development of ideas that will have greater debate on the role of the Federal Government and how, frankly, we can return more liberty to our people, a liberty I would say to do good and not to do evil.

Mr. SHADEGG. Thank you very much.

Mr. HOBSON. Representative Woolsey.

Ms. WOOLSEY. Thank you, Mr. Chairman. I came in here very concerned about listening to this panel and about how our State and Federal tax dollars can be spent so that those who need us the most and depend on our government aren't left behind—so that we

wouldn't be giving up on our national standards and wasting our tax dollars in the long term.

But after listening to so much reference to Madison and Jefferson, I can't help but question—you don't believe that they for a moment envisioned States the size of my State, California, with a population of over 30 million, with the seventh largest economy in the world? I mean, how could they even for a second envision the complexity of the world we live in today, where we have environmental boundaries that exist globally, where we have travel and communications that have broken down boundaries between the States, where we have such a great difference between the haves and the have-nots in this country, where actually a member of this committee could point to welfare as the rationale for low wages in the computer industry and not for a minute step up to eliminating a system where CEO's in this country earn 170, 180-plus times what their average workers earn and get millions and millions of dollars in bonuses when they lay their workers off?

Jefferson and Madison did not envision this when they envisioned and talked about federalism. So what I want to caution is, yes, federalism is simpler, but let's not be simpleminded.

Now, what I would like to ask Dr. Gold—you know a lot about the harmful impacts of block grants to States. Could you comment to us on how education funding, K through 12 and higher education, could be affected by block granting?

Mr. GOLD. Yes. As I said, there is very—there is not enough money to go around in State capitals, and your State of California is a good example of that. California had—until recently, had, you know, worse budget problems than any other State for several years. What has happened in California is a good example.

At one time, California had an excellent education system, but over time now, we see that the class sizes in California are much, much greater than they were—I think they are among the largest in the country—and the spending per pupil has fallen way behind most other States.

Of course, spending doesn't necessarily correlate with quality. But most people would agree that when the class sizes get as big as they are in California, that is a problem.

Now, that didn't happen because the officials in California don't care about schools; it happened because the State budget was very, very stressed. If the Federal Government reduces aid, which happened under the reconciliation bill, eventually, not right away, but eventually that would amount to a big hit on State revenue.

Federal aid accounts for between one-quarter and one-third of State revenue. So if you reduce it 15 or 20 percent, as happened, by 2002 States would have to make difficult choices; and the biggest loser in State budget battles in the 1990's has been higher education. States have been making college students pay a bigger percentage of the cost of higher education, and tuitions have gone up at a double-digit rate for year after year after year in many States; and again, California is an example.

So even though the block grants would not affect education directly, by adding to State budget problems, one can predict confidently, based on what has happened in the 1990's, that aid to ele-

mentary and secondary education and higher education would suffer.

Ms. WOOLSEY. I am through. Thank you very much.

Mr. HOBSON. Representative Smith.

Mr. SMITH OF MICHIGAN. Thank you, Mr. Chairman.

Mr. Gold, do you agree with the Federal unfunded mandate law?

Mr. GOLD. I am not—I think that it is important to have an unemployment system. It could certainly be improved. I am not saying that it works exactly the way it should work, but I think the Federal Government should assure that—you know, that all States have an unemployment system.

Mr. SMITH OF MICHIGAN. If the Federal Government wants to extend its social policies, environmental policy, its minimum wage policy, whatever, you are saying you think it is OK to pass on this cost to the State. Or should the Federal Government when developing new policies say, "Well, if this is a Federal decision, we should reimburse the States for their costs of implementing it?"

Mr. GOLD. I think—I would say that the unemployment system, to a considerable extent, is already devolved to the States. So if a State has an experience of high unemployment, then—

Mr. SMITH OF MICHIGAN. But moving away from the unemployment to a general concept of the unfunded mandate bill passed in the House, you are saying that that is OK?

Mr. GOLD. I think the unfunded mandate bill passed in the House, based on the experience in States that have similar bills, is probably not strong enough to really protect the States.

What we see in the States when they have unfunded mandate laws which are statutory rather than constitutional, is that State legislatures usually find ways to get around them. So I think that—

Mr. SMITH OF MICHIGAN. Do I hear you say that you are for a stronger unfunded mandate bill, so as to further limit government passing on the cost to States?

Mr. GOLD. Yes.

Mr. SMITH OF MICHIGAN. Great.

Secretary Dunlop and Mr. Lund, let me ask you the question on another concept of federalism where the taxes are collected at the State level, and then they are sent to the Federal Government. The Federal Government manipulates, massages those taxes and then sends what is left back to the States.

I might use the example of the Federal gas tax, where the Federal Government now has a policy that they are striving to send at least 90 percent back in the process of collection coming to the Federal Government, the Federal bureaucracy, using upwards of 1.2 percent in administration, dividing some of the money off as they think it should be prioritized.

Would it be reasonable to allow the States to keep that 90 percent of the gas tax money in the first place instead of sending it to the Federal Government and then sending it back to the States? Any reaction?

Mr. LUND. I certainly think so. I think you can—I have been especially critical of unfunded mandates, but you can get a kind of unfunded mandates in reverse where the State governments are allowed to spend somebody else's money without the obligation to

raise the taxes to get that money, and that can lead to irresponsibility by State officials just as much as it can lead to irresponsibility by Federal officials when you have the practice of unfunded mandates. I think they are two sides of the same coin in a sense.

Ms. DUNLOP. Well, Representative Smith, with respect to your point about unfunded mandates, of course, we think that unfunded mandates are wrong. It really removes accountability from the Federal bureaucracy, and indeed the Federal Government places really an undue burden on State governments and the State taxpayers.

I will tell you that in Virginia we passed last year a law in the general assembly requiring the Federal Government to convert its government fleet in northern Virginia to clean fuels in 1995 if they were indeed serious about solving air quality problems. They have stiffed us. I don't believe they have converted many vehicles, if any vehicles. They certainly haven't complied with Virginia's unfunded mandate on them.

With respect to where taxes are collected, it is a little bit, it seems to me somewhat lacking in accountability and responsibility to collect money from States, bring it to Washington, siphon off a few dollars for administrative purposes and then send the money back.

For instance, in Virginia, if one of the things that we have advocated is the—when we are talking about Environmental Protection Agency laws and regulations, we have asked that only the grants to the States and localities be funded—be fully funded, and that the money—that the other moneys that the government, the Federal Congress believes need to be cut, be cut from elsewhere in the EPA budget, because it is those grant moneys going directly to State programs and localities that are actually engaged in deeds that in fact improve the quality and condition of our environment.

Mr. SMITH OF MICHIGAN. I appreciate your answers. Thank you very much.

Mr. LUND. If I could add one small point, it seems to me there are two different phenomena. One is where State officials are kind of just given money, and they get to spend it any way they want without having to raise the taxes for it. There is another kind of similar-looking phenomenon, though, where the Federal Government collects the money out of the States and then sends it back to the States in the form of a grant, but with conditions on it telling the States how they have to spend the money.

Mr. SMITH OF MICHIGAN. Such as a gas tax.

Mr. LUND. It seems to me that is a close cousin of the unfunded mandate and has some of the same problems as the Federal unfunded mandate.

Mr. SMITH OF MICHIGAN. Thank you, Mr. Chairman.

Mr. HOBSON. Ms. Roybal-Allard.

Ms. ROYBAL-ALLARD. Thank you, Mr. Chairman.

One of the concerns that I have with regards to the block-granting is that it could result in American citizens receiving differing quality of care, depending on where they live, because the evidence has shown that the States are not uniform in their ability to manage and to deliver services. Such would be the case with Medicaid, and if the Medicaid was block-granted to States without any na-

tional health care standards, there would be this varying quality of health services to our citizens.

What suggestions do you have to give to us where we could avoid these kinds of problems?

Ms. DUNLOP. Well, that is not my area in State government, but I would be very pleased to provide some material to you from our State that has been submitted through our congressional delegation on ways to reform the Medicaid system. I do think that one of the great benefits of our system, and also one of the issues that you need to be concerned about as a member of the Federal Government, is the difference in the types of programs that are provided.

But then one of the beauties of our system is to have States providing, as these laboratories of democracy, different ways to serve people. And I think sometimes when you look at things from Washington, DC, things are not as they seem, but it makes it very difficult, I think, for Federal Government officials to make determinations about how or if people are being appropriately served; and that is why we believe that Governors, State legislators and even localities and the private sector are really the best determiners of appropriate services being provided as that safety net in our society.

Ms. ROYBAL-ALLARD. How would we be guaranteed that, regardless of where you live, there would at least be a minimum quality of care, whether you lived in California or Mississippi? How could we be assured of that without some kind of minimum standards being put in place?

Ms. DUNLOP. Well, again, I would like to defer my answer and provide it to you later, because I am sure Virginia has taken a position on that.

[The information referred to follows:]

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE GOVERNOR,
Richmond, VA, January 23, 1996.

Hon. BILL CLINTON,
The White House, Washington, DC.

DEAR MR. PRESIDENT: I am deeply concerned that your most recent budget continues to reject the congressional MediGrant initiative. This proposal would have provided real reform of Medicaid and true flexibility to the States to control costs and improve the quality of care for our citizens. In contrast, your proposal maintains inflexible requirements that tie the hands of the States, but places a per capita cap on Federal expenditures. The effect of these policies will be a major shift of costs to States.

By proposing to increase Federal spending on Medicaid by 74 percent between fiscal year 1996 and fiscal year 2002 while also calling for the continuation of current Federal matching requirements, your budget plan assumes the States will provide an additional \$50 billion annually in matching funds by fiscal year 2002. That means States will be required to spend an additional 70 percent in matching funds by fiscal year 2002.

In Virginia, your plan for Medicaid will cost an additional \$794.2 million in matching funds. These are funds that would not be available for critical priorities like education, public safety, or economic development. Put into perspective, this amount is approximately \$150 million more than the total State funding for all 4-year colleges and universities in Virginia. If the Commonwealth had to come up with that amount of money this year, the equivalent of a 45-percent increase in sales taxes would be required.

Your plan would be a devastating setback to Virginia's current efforts to focus more of our resources on critical priorities like education, while holding the line on taxes. Please, Mr. President, give us the flexibility to protect both the Federal budg-

et and State budgets from these ever-escalating costs, and the freedom to improve the quality of care for our citizens. We need reform, not the status quo.

With kind personal regards, I remain

Sincerely,

GEORGE ALLEN.

MEDICAID

TALKING POINTS ON PER CAPITA CAP

Unfunded State Mandate:

Per capita cap: It is the administration's attempt to create the largest, unfunded Federal mandate on States. It keeps the entire Medicaid program intact—mandatory entitlements, mandatory benefits package, and all of the HCFA micromanagement of the States by Washington bureaucrats.

Cost Shift to State Taxpayers:

At the same time that it leaves the entire Federal bureaucratic management of the program, it limits Federal financial exposure by the cap. In essence, it is one huge cost shift to State taxpayers by the Federal Government. It keeps all of the Federal mandates but now it has the State taxpayer picking up the bill.

More Inefficiencies:

A per capita cap will lead to more inefficiencies in the program because now HCFA bureaucrats will have to track spending per beneficiary by eligibility type—the disabled, elderly, adults and children.

Federal Lawsuits:

It could expose States to unlimited Federal lawsuits when the Federal payments are not sufficient to provide benefits mandated by the Federal Government. It will also lead to a proliferation of Boren and "Boren-type" lawsuits because of the capped Federal exposure.

Freeze State Inequalities:

It would freeze State inequality and current per capita payments in place, as opposed to the distribution formula in the current conference report which over time will tend to equalize payments among the States on a per capita basis. A per capita cap will freeze State payments where they are now without any ability to equalize payments in the future. This will create large winners and losers among the States.

PRESIDENT'S MEDICAID PROPOSAL AND DISPROPORTIONATE SHARE

The Latest President's Medicaid Proposal Has Three DSH Impacts:

1. (Sec. 1923(a)(2)(A)): DSH is no longer limited to inpatient hospital services. It can be paid for outpatient services, FQHC's, RHC's, and even nursing homes and rehabilitation providers. By itself this is not a problem, but in combination with item 3 below it could force DMAS to make changes we would not want.

2. (Sec. 1923(a)(5)): This version of the bill simply continues the DSH limit created by OBRA 1993. This might not be the provision States would most prefer, but it is pretty reasonable and we have learned to live with it. It is far better than the one in the "common sense" bill reviewed last week.

3. (Sec. 1923(b)): This provision is a new departure in Federal micromanagement. It requires the Secretary, *for the first time ever*, to determine whether a State's DSH methodology meets previously unstated Federal policy standards. These standards may be at odds with the State's policy goals, which until now have been acceptable to HCFA.

For Virginia, the Federal policy standards would force significant changes to the DSH methodology. Virginia distributes DSH based on hospitals' Medicaid percent utilization, and pays an "enhanced" amount to the State teaching hospitals to recognize their extensive indigent care load. *This bill appears to preclude any special recognition of State teaching hospitals.* To continue to pay the current level of DSH to MCV and UVA, DMAS would have to adopt a much more generous standard of DSH payment to all other hospitals as well. Both Federal and State resource limitations preclude this, so the likely outcome is less DSH funding of the teaching hospitals.

If Federal interpretation of this bill holds that all providers eligible for DSH under item 1 above must get an "appropriate distribution" based on this section, DMAS would have to pay DSH to more provider types. Given the limits that exist, this would necessarily mean less DSH for hospitals and in particular for the teaching hospitals.

PRESIDENT'S MEDICAID BILL

Provision	Description	Comments
Section 11301: Limitations on per beneficiary rate of growth in FFP	Total expenditures by a State for fiscal year 1997 and beyond shall not exceed limit. Per beneficiary base rate based on fiscal year 1995 expenditures for medical assistance for each of the following groups: (1) Nondisabled Medicaid Child; (2) Nondisabled Medicaid Adult; (3) Elderly Medicaid Beneficiary; (4) Disabled Medicaid Beneficiary. For base year administrative costs, the Secretary shall apportion to each of the three groups an amount in the same ratio to the base year expenditures for administrative costs. Aggregate limit on total Federal payments for fiscal year 1997 and beyond are an aggregate amount equal to the sum of the group limits. Not counted or subject to payment limits are DSH payments, Medicare cost-sharing, fraud and abuse activities, nursing facility survey and certification, vaccines.	Retains individual entitlement to Medicaid. Federal government defines eligibility groups. No indication that States will be given the flexibility to simplify eligibility.
Section 11302: Reduction of disproportionate share payments	DSH payment shall not exceed the cost incurred during the year by an eligible entity for furnishing health care services to individuals who either are eligible for medical assistance under the A State plan or have no health insurance. Federal payments will be limited to a declining percentage, fiscal year 1996—80 percent, fiscal year 1997—75 percent, fiscal year 1998—65 percent. Each of 10 States with the highest percentages of unsponsored hospital care and Medicaid shortfall for 1980–1991, will be entitled to transitional Federal payments for costs on uncompensated care. For undocumented immigrants, each of the 15 States with the largest number of illegal immigrants, will be entitled for each of fiscal years 1996–2000, an amount equal to the ratio of illegal immigrant population in the State to the total illegal immigrant population in all 15 such States in 1992.	DSH no longer limited to inpatient hospital services. DSH can now be paid for outpatient services, FQHC, RHC's, and possibly nursing homes and rehabilitation providers. Secretary will determine if a State's DSH methodology meets Federal policy standards. Bill may preclude special recognition of teaching hospitals which would hurt MCV, UVA. How will DMAS track payments for uninsured patients?
Section 11303: Medicaid eligibility quality control requirements	Aggregate Federal payment limit applicable to a State for fiscal year 1997 and beyond will be reduced for the number of excess erroneous enrollments of individuals.	
Section 11311: Extension of coverage to additional individuals, subject to poverty-related or case-load limits	Eligibility can be expanded at the option of the State, to (i) individuals whose income does not exceed a limit of 150 percent of poverty; (ii) individuals in categories defined by the State, whose enrollment in the program under the State plan would not result in an increase of more than 30 percent in total enrollment. Additional enrollees would not be included in the calculation of the Federal payment limit.	This provision would make it much easier to implement the Health Insurance Demonstration project. It does not sound as a waiver would be needed for the reinsurance component.
Section 11312: Elimination of authority for new eligibility expansion demonstrations	Waivers of requirement of section 1902 with respect to eligibility of individuals for medical assistance will not be granted after October 1, 1996. Waivers may be extended or modified.	Health insurance demonstration waiver would not be approved after October 1, 1996, but could be modified/extended if it was approved before October 1, 1996.
Section 11313: Upper income limit on "less restrictive" eligibility methodologies	Income eligibility limit based on gross income—150 percent of poverty. Limits the authority of States to set more liberal income standards.	States cannot extend eligibility to individuals with incomes above 150 percent of poverty.

PRESIDENT'S MEDICAID BILL—Continued

Provision	Description	Comments
Section 11321: Primary care case management services as State option without need for a waiver	Primary care case manager can to a nurse practitioner, certified nurse-midwife, physician assistant. Enrollees can terminate enrollment, without cause, during the first month of each enrollment period, can be locked in for up to 6 months. Recipient can terminate enrollment at any time for cause.	Waiver for Medallion I type of program no longer needed. Since Medallion I already statewide in Virginia, of little value to us. May eliminate the need to evaluate the program. We may be able to make changes in Medallion I much easier.
Section 11322: State options to restrict choice of providers	Mandatory Enrollment in Managed Care—recipients can now be required to enroll in HMO without the need for a waiver. Recipients can choose between at least 2 such entities. The State can restrict such individual from changing their enrollment without cause for periods no longer than 6 months. Recipients are permitted to change enrollment for cause at any time. Family planning providers are exempted. Conditions do not apply to Medicare cost sharing.	Waiver no longer needed for Medallion II. Permits 6-month lock-in for Medallion II.
Section 11323: Elimination of restrictions on risk contracts	75 percent limit on Medicare and Medicaid enrollment eliminated.	Allows States to contract with HMO's which serve only Medicaid recipients.
Section 11324: 6-month guaranteed eligibility for all individuals enrolled in managed care	Gives States the option to guarantee 6-month eligibility to individuals who are enrolled in HMO's or who have primary care case managers.	Would this increase our Medallion I and II costs if recipient is guaranteed a 6-month eligibility? It could but this is not a mandate.
Section 11325: Requirement to ensure quality of and access to care under managed care plans	State required to develop and implement a quality improvement strategy, consistent with standards established by the Secretary. Access is to be ensured, procedures for collecting patient data, procedures of analysis of patient data, providers are required to demonstrate a capacity to deliver covered services to all enrolled individuals, providers must maintain an internal quality assurance program meeting the Secretary's standards.	Would impact Medallion II if the Secretary developed more stringent standards. DMAS already has a quality improvement strategy for Medallion II. DMAS reviews access, requires patient data, providers must demonstrate capacity in their contract.
Section 11331: Home- and community-based services as State option without need for waiver	Waivers no longer needed for these programs. No longer need waiver of statewideness, comparability of services, income and resource rules applicable to the community.	Would eliminate the time-consuming task of preparing and modifying these waivers. Would be easier to set up alternatives to long-term care institutionalization. Not sure of impact on PACE since Medicare may still require the waiver.
Section 11332: Elimination of requirement to pay for private insurance	It will be a State option to purchase or pay for enrollee costs of health insurance.	HIPP no longer a required program.
Section 11333: Benefits for individuals covered during transition to work	The State may limit the amount of any deductible or copayment for any health care item or service to the applicable portion of the amount the State would pay if such item or service had been furnished by a provider participating in the program under the State plan. If the State elects to pay such deductible and coinsurance, the State may limit the amount of such payments.	State only has to pay deductibles and copayments up to the Medicaid allowed rates (not the full amounts of the deductibles and copayments responsibility of the insured beneficiary).

PRESIDENT'S MEDICAID BILL—Continued

Provision	Description	Comments
Section 11341: Methods for establishing provider payment rates	States are to provide for a public process for determination of rates of payment under the plan for nursing facility services and services of intermediate care facilities for the mentally retarded. Proposed rates are to be published and providers, beneficiaries, and others can review and comment.	This repeals Boren amendment for hospitals and nursing facilities. Requires 100 percent of costs for federally qualified health centers, rural health clinics and Indian health centers. Requires a public process for ratesetting that could cause problems, but is better than Boren.
Section 11342: Physician qualification requirements	Deleted.	Will remove some red tape and permit States to pay nonpediatricians to render pediatric care.
Section 11343: Elimination of obstetrical and pediatric payment rate requirements	Section 1926 is repealed.	Will remove some redtape regarding justification of pediatric and OB fees.
Section 11353: Elimination of requirements for cooperative agreements with health agencies	Section 1902(a)(11) repealed.	Why was this removed? No real advantage here. This is nickel and dime stuff.
Section 11354: Elimination of requirement for annual independent review of HMO care		DMAS would no longer need independent review for Medallion II.
Section 11355: State review of mentally ill or retarded nursing facility residents upon change in physical or mental condition	Reviews will be required upon change in the condition of a mentally ill or mentally retarded resident. Language has been added that a nursing facility shall notify the State mental health authority promptly after a significant change in the physical or mental condition of recipient who is mentally ill or mentally retarded.	Annual reviews are no longer needed. Reviews must be done every time there is a change. Might have to be done more often than annually. More reporting will be required of providers. States still have to perform preadmission screening and reviews.
Section 11356: Nurse aide training in Medicare and Medicaid nursing facilities subject to extended survey and under certain other conditions		
Section 11357: Combined State plan submission	A single State plan can be submitted to carry out: (1) the long-term care grant program; (2) the program of health insurance for the temporarily unemployed; and (3) the medical assistance programs under title XIX.	
Section 11361: Effective date	10-1-96.	

EFFECT OF A CAPPED ENTITLEMENT

Entitlement means that every person in the State who meets the eligibility criteria must be enrolled regardless of available funds.

Currently, Federal matching is guaranteed if the State puts up its share (current FMAP equals 51.37 percent in Virginia). A cap removes this guarantee. In a capped entitlement, States will bear full cost for expenditures above the Federal cap.

Since 1988, Federal mandates have greatly increased Medicaid expenditures by expanding enrollment, increasing reimbursement, and mandating additional services.

A capped entitlement:

- Caps the amount of Federal matching payments and forces States to absorb future cost increases without Federal funds.

- Leaves the Boren amendment intact but will not fund increases in Medicaid expenditures resulting from mandated increases in reimbursement rates. Under the Democratic proposal, only expansions in enrollment and increases in Medicare cost-sharing will be exempt from the Federal cap. Increases in reimbursement (not exempt from the cap) accounted for one-third of increases in Medicaid spending from 1988 to 1991. The Boren amendment has caused Virginia over \$60 million in additional costs since 1990 as a result of Federal court orders.

- Continues the mandate that State eligibility rules follow those of the Federal cash assistance programs. These requirements prevent States from streamlining and simplifying eligibility. Medicaid eligibility is notoriously unintelligible and inequitable. Such rules increase administrative costs, mystify applicants, and treat groups of poor people differently. For example, income limits vary from 28 to 200 percent of poverty depending on the "category" a beneficiary meets.

- Places Federal runaway costs on back of Virginia without affording Virginia government any authority to control them.

- Requires States to continue to pick up an ever-increasing share of the cost of Medicare by mandating States pay part of the cost-sharing for indigent Medicare beneficiaries. States have no control over Medicare fees, coverage changes, increases in deductibles, copayments or premiums. Even though these fees are not subject to the cap, as out-of-pocket expenditures for Medicare beneficiaries increase, additional State funds will be required to keep pace.

Ms. ROYBAL-ALLARD. Mr. Lund or Mr. Gold?

Mr. GOLD. We already do have tremendous differences among the States in the quality and quantity of services. And the block grant approach, if it loosened restrictions, would lead to even greater differences among the States. So welfare benefits, Medicaid programs, vary tremendously among States already, and those disparities would become much greater; and the only way to avoid that would be to—which is against the philosophy of block grants, would be to have—put a lot of restrictions in there, which would make it very difficult to cope with the loss of revenue.

One point I would make that is related to that is that on welfare reform where we have these great differences—and we are going to hopefully see benefits from increased flexibility—it is very important that we evaluate the experiments that are going to go on under welfare; so it is important that in the welfare reform bill, if there is one, there be sufficient revenues provided for good evaluations so that we can actually see which of these experiments work as we hope they will, and which of them don't. We can't just turn it over to the States and assume it will get better; we have to carefully keep an eye on that and study it.

Mr. LUND. I am not sure what the problem is with nonuniform levels care. There is obviously infinite potential demand for services like health care. We can't provide every American with as much health care as every American would like if it were all free, because it has to be paid for.

So I don't really see why one would assume that the nonuniform levels of care among various States and among various individuals is necessarily a bad thing.

Ms. ROYBAL-ALLARD. What I am talking about is a minimum standard. I understand you can't offer everything the same, but there should be some minimum standards, for example, with regards to prenatal care, which would be extremely important, that there should be maybe a minimum standard with respect to poor pregnant women and their ability to receive prenatal care would be an example of what I am talking about.

I understand you can't have everything the same, but there should be some kind of minimum standards that, regardless of what State you live in, you should be able to receive some minimum amount of health care.

Mr. LUND. I guess that depends on what you are assuming the minimum is.

I don't think I would be willing to assume that any State in this Union, any government in this Union would necessarily fail to provide what I might consider an adequate minimum, but even if they did, I am not sure why I should be the one to decide what an adequate minimum is rather than letting the people in the various States decide what is an adequate minimum.

Ms. ROYBAL-ALLARD. Perhaps the American Medical Association or some organization that has the expertise in medicine could determine some kind of basic—

Mr. LUND. I think the American Medical Association primarily has an incentive to set it very high because that benefit hits the members' pocketbooks.

Mr. HOBSON. The gentlelady's time has expired.

Mr. Pomeroy has been sitting here wasting time. Mr. Pomeroy.

Mr. POMEROY. Thank you, Mr. Chairman.

I used to be a State insurance commissioner; it is a unique activity for giving a perspective on this issue, but that is one function of State government that operates under a specific delegation of responsibility from Congress. Insurance being held by the Supreme Court to be interstate commerce, Congress enacted McCarren-Ferguson in 1945 specifically delegating regulatory responsibility to the States. I fought—in fact have testified at more congressional hearings than anyone in the room, I am sure—against the Federal usurping of State role when it comes to regulating insurance.

Having said that, believing—still believing in the primacy, appropriate primacy of State regulation of insurance, let me observe to you that three commissioners with whom I served as colleagues went to penitentiaries for their inappropriate, in fact illegal, conduct as regulators.

There is nothing mythical about State performance. Sometimes I believe your remarks, particularly you, Madam Secretary, are a bit overreaching in terms of the ultimate sanctity of State regulation.

You talk about the Safe Drinking Water Act. I completely agree that the EPA is operating under a ridiculous statute and reform is necessary.

What about the Clean Water Act, House Resolution 961, that passed last year in the House; are you familiar with that legislation?

Ms. DUNLOP. Not with all the detail, but in general terms.

Mr. POMEROY. Do you have a position for or against it? You don't have to have a position.

Ms. DUNLOP. We supported the Clean Water Act in the form it passed.

Mr. POMEROY. All right. Let me read to you words written by a wise person.

Repeal is not reform. The word "reform" must not be used as a euphemism for rolling back environmental protections. H.R. 961,

the Clean Water Act, for example, would have eliminated the program that limits discharges of storm water, even though storm water runoff is responsible for more than 25 percent of damage to water quality in the United States.

That is not reform.

The gentleman continues to write, while States need to be given more responsibility, the Federal Government cannot abdicate its role. The right wing likes to suggest sarcastically that arrogance is the only reason any policymaking remains in Washington. That is a nice applause line, but it flies in the face of everything we know of how the world operates.

Air and water are unbridled. The Midwestern utilities were responsible for acid rain causing deterioration in the Adirondacks of New York State, but Ohio officials had little incentive to correct the problem. It took the Clean Air Act of 1990 and the Federal role.

This gentleman also writes, the early environmental activities of the 104th Congress, this Congress, most notably the attempts to dilute the Clean Water Act and restrict the enforcement authority of the Environmental Protection Agency, did real damage not only to the reputation of the Republican Party, but to the cause of environmental reform.

The gentleman writing those wise words is Representative Sherwood Boehlert, Chairman of a Transportation and Infrastructure Subcommittee, a Republican Member of this Congress.

I believe your testimony in making a statement like, "I can guarantee you that States and localities do a better job of solving environmental problems than the EPA ever has or will," is an example of just such an overreaching, extreme position that has, I think, been a discredit to the Republican Party, as noted by Representative Boehlert.

I guess my time has expired. But if the chairman would allow, I would be most interested in your response.

Mr. SHADEGG. By all means, I would like the witness to respond.

Ms. DUNLOP. First of all, let me say I don't believe anywhere in my testimony you will find me saying that there is any perfection in humankind at any level of government. There are people who are fallible in every level of government—insurance commissioners, secretaries of the environment, and even occasionally a bureaucrat.

However, we believe that the government closest to the people is the government that is best able to handle the problems and develop solutions that are cost-effective for the citizenry. We believe that to be the case. We believe it is demonstrated by all empirical evidence.

I believe I said earlier to this committee that we thought there was an appropriate role for the Federal Government in environmental policy. That seems to be lost in a lot of people's translation of what I said; but I did say that, and we do believe that. We have worked with other States, we have worked with the States of Maryland and Pennsylvania together, to try to make sure that we are working to improve the Chesapeake Bay. We would do that whether there was Federal Government involvement or not, but the fact is, the Federal Government takes taxpayer dollars out of the pockets of people who live in Pennsylvania, Maryland, Virginia, and the District of Columbia, brings it to Washington, skims off some from

the top, and returns some of it to the Commonwealth and other States to work on the Chesapeake Bay.

We are happy to take that money and use it for cleaning up the Chesapeake Bay. But we would be committed to cleaning up the Bay whether or not the government was involved.

We believe there are example after example across this country, and indeed across the world, where people who live in communities that find that they have a pollution problem work very hard to clean it up because it is their quality of life that is impacted.

Have we benefited from having science available to us and having opportunities to visit with other States under the auspices of various committees of the Environmental Protection Agency? I would argue that, yes, we have. However, we have also been limited at the State level in our opportunities to use creative ideas and innovative technology to solve environmental problems.

Storm water runoff is a problem in Virginia which we are tackling every day. We will continue to tackle it every day and work with our localities on ways to improve the storm water runoff mechanisms so it is not degrading to our environment. We would do that whether or not the Environmental Protection Agency was involved.

Frankly, it is very discouraging to our citizenry, to our local citizens, our local governments, and indeed the people who work with me who are bureaucrats in State government to have Federal officials say, the only reason you are cleaning up your environment is because Big Brother Federal Government is making you do it.

We believe that while there have been benefits to Federal Government, to improving our environment, pointing out particular problems, bringing new science to bear, bringing innovative technologies from one State perhaps to another State we might not know about as quickly if it were not for the Federal presence, nevertheless people in States do care about the quality and condition of their environment. We do in Virginia. We are working every day to work to improve the quality and condition of our air, and sometimes we are doing it in battle with the EPA, because we believe the solution they are mandating on us is wrong for the people and wrong for the environment.

Mr. POMEROY. Mr. Chairman, may I make just a follow-up comment or observation in the constructive spirit of this dialogue?

Mr. SHADEGG. Briefly, yes.

Mr. POMEROY. The dichotomy is sometimes a very useful one between the State and Federal Government.

When the Federal Government would be rattling its saber on insurance regulation, for example, at the State level, we were able to move forward with greater vigor and less industry opposition than we would have otherwise. I think that sometimes the respective pressure, one sphere of government on the other—not always the Federal on the State, although that has been the trend of late—is a healthy one.

Just in closing, in those circumstances where the economic interests of an upstream State, for example, are quite different from a downstream State that might be an area where comity between jurisdictions working it out on their own might break down. It has in the past and I believe would in the future.

Ms. DUNLOP. May I respond?

Mr. SHADEGG. Certainly.

Ms. DUNLOP. I think that has been the case. Oftentimes that has broken down between States. Part of the reason for that, I think, is because we have seen this power flow to the Federal Government, and too often people say, well, gee, I don't need to work this out with my neighbors. I'll just get EPA or the Congress to pass a law to fix the problem for me.

I don't think that it is necessarily going to be easy for us to return to the proper constitutional balance. I don't necessarily think it is going to be easy for States to work out problems that cross borders, but I think it is time for us in this country to begin to move back toward that concept of community and neighbors; and in Virginia, we have reached out to our neighbors and said that very thing, if we are going to argue for the 10th amendment, if we are going to argue that States should have a more appropriate balance in terms of how people are governed, we have to be willing to reach out and try and stay in touch with our neighbors now, before we have problems.

There are sometimes going to be problems that cannot be resolved, and to the extent there is still a Federal role or appropriate Federal people who are working who can perhaps facilitate discussions or dialogue, great, we are happy to involve them; and we certainly welcome the good science that they can provide. But sometimes those challenges simply are going to have to go to our court systems. That is why we have a court system.

I think it is incumbent upon all of us who work in State government, who really believe the 10th amendment is appropriate, to work extra hard to be sure we are reaching out to our neighbors and we are trying to arrive at constructive partnerships, if you will, with our neighbors to deal with some of these challenges that do cross borders. I think our Governors are doing that through the National Governors' Association on issues like welfare reform, to try to make sure that good ideas are exchanged and people understand what challenges are faced by neighboring States.

So I think there is—we are not asking the Federal Government to remove itself from everything they are doing now. We are simply saying, please take a look and make sure there is a constitutional role for the Federal Government, and where there is not, let the States take up the challenges. It doesn't mean the Federal Congress itself can't be aware of people that slip through a safety net, or an environmental problem not dealt with in an appropriate manner, and step in and work with us to resolve it. I think it is appropriate for the Congress, and perhaps Members of this very Congress will find that the next time they run for reelection, they would rather run for Governor or State legislature, because in the States we will be dealing with more of these challenges that Members of this Congress now find to be ones they want to deal with.

Mr. POMEROY. I found my service in State government vastly preferable. Thank you, Mr. Chairman.

Mr. SHADEGG. We have been through one round, I will exercise the prerogative of the Chair and ask one question myself, because I was not able to get to it earlier; and if any other members of the

committee show up or any members want to ask a second round, we will accommodate them.

Mr. Gold, you made a remark about the fact we need to be concerned about States becoming welfare magnets were we to move in devolution into that area. My State, Arizona, borders California; it has quite a different welfare structure than the State of California, perhaps not radically so, but quite significantly in many areas. I don't see a problem there. I don't see a great deal of difficulty indeed in allowing the States to have different welfare structures tailored to their States. However, Mr. Orton raised the prospect of that being perhaps gravely dangerous.

Your testimony, or at least your remarks, suggested you think we need to be worried about it, and yet you didn't have a chance to expand on that. I would appreciate it if you would do that now.

What dangers do you see in having a State become a "welfare magnet," and what do you mean by that and what problems do you foresee? You need to address it, I guess, in the State of—assuming it is State-funded, and assuming also if it were federally funded?

Mr. GOLD. Well, I think the main problem with the welfare magnet phenomenon—and we are really not sure the extent to which it exists; it certainly exists to some extent, but it isn't clear whether it is a small problem or a bigger phenomenon. It would probably become bigger under block grants, because the differences amongst States would be evident.

The main issue, I believe, that Congress should consider is that the welfare magnet phenomenon would discourage States from having relatively high benefits, because it would not only get more poor people moving in for welfare, but it would also have more poor people who would need Medicaid and other social services.

Mr. SHADEGG. Let me stop you there and ask you a question. If that is true, how do you explain California's dramatically higher benefits than other States, and they do so with State resources added to Federal resources?

Mr. GOLD. Well, many States consider various factors in deciding how generous their benefits are going to be and contrary to popular belief, welfare in the narrow sense of AFDC is not a big portion of State budgets and has not really been increasing very fast.

Incidentally, you might be interested to know that Arizona actually had one of the largest increases in welfare caseloads in the entire country in the early 1990's. Even though your benefits are much lower than California's, many people, I guess, moved from California to Arizona anyway.

So I have looked at that and said, that is proof that the relative welfare benefit level is not the main reason why people move. I think people often move because they think they are going to get a job, and then when things don't work out or they get laid off, they go on welfare.

So there are many factors that determine States' policies. The fear of being a welfare magnet is only one, and so it is not an overwhelming one; in the past, however, there is some evidence that it has discouraged States from spending as much as they would otherwise, and I think it would become a greater issue in the future when we no longer had the matching grants, which really have given more of an incentive for poorer States to spend money than

the richer States because of the matching rate that could go up to 80 percent versus only 50 percent.

Mr. SHADEGG. But your study shows that although Arizona has lower benefits than California there has been an out-migration from California into Arizona?

Mr. GOLD. Right.

Mr. SHADEGG. That would suggest that certainly something else is driving that rather than welfare benefits.

Mr. GOLD. It is a mistake to think that one factor alone explains everything. Relative welfare levels are a factor for some people, and they would be more of a factor, say, in Delaware, where it is such a small State and people could more easily move to Maryland or Pennsylvania, than it would be out in Arizona where there are not that many people who live near the border.

Mr. SHADEGG. In point of fact, during—the time period of the recent years has had a much more dynamic economy with a lower tax rate than California.

Mr. GOLD. Right. California was hurt much worse by defense cut-backs; that is the reason the economy was so bad and that just illustrates the fact there are many factors that affect the State economy and there are many factors that affect welfare levels.

Mr. SHADEGG. And indeed, right now, States, both Arizona and California offer significantly more benefits—at least benefits beyond that which the Federal Government requires, don't they?

Mr. GOLD. I am not familiar with Arizona, but I know California does.

Mr. SHADEGG. I can assure you Arizona does.

Secretary Dunlop, Mr. Lund, would either of you care to comment?

Ms. DUNLOP. Representative Shadegg, let me say, we in Virginia obviously believe if you have a growing economy and more jobs available for people that programs like our welfare program will be more successful, and probably we will become a welfare magnet because our goal in Virginia is to help people who now are on welfare get jobs. Even in the few months we have had the program under way, we have been successful because we have found that, by and large, people who are on welfare want to work, want to regain the self-esteem that employment and self-employment, going to work, provides, and don't want to be dependent on the State. So I think that the whole concept of welfare magnets may be turned on its head as we find which States really are willing to put the effort into making sure their economies are growing so that welfare recipients have a place to move to to get off welfare and to have an income and have that restoration of family that people in our country value and crave, and have the self-esteem that working for a living provides.

Mr. SHADEGG. Yes, Mr. Lund.

Mr. LUND. Since I don't assume welfare is one of those things which more of is necessarily better, the idea that States—that some competition among States would result in some lowering of the current level of welfare benefits doesn't necessarily strike me as a bad thing.

I would also add, of course, that welfare properly understood comprehends much more than AFDC and is quite a significant portion of our national expenditures.

Mr. SHADEGG. Thank you very much.

Mr. Orton.

Mr. ORTON. No more questions.

Mr. SHADEGG. I would like to thank the panelists for your very helpful and informative testimony, and I will adjourn this meeting.

[Whereupon, at 12:30 p.m., the committee was adjourned.]



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